MODERN
BUSINESS PRACTICE

MODERN BUSINESS: PRACTICE

A COMPREHENSIVE PRACTICAL GUIDE AND WORK OF REFERENCE FOR OFFICE WAREHOUSE EXCHANGE AND MARKET

Prepared by many Specialists under the Editorship of

F. W. RAFFETY

Barrister-at-Law

VOLUME IV

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FOREWORD

PRESENT-DAY BUSINESS OPENINGS

By Sir ROBERT W. PERKS, Bart.

I am asked whether the business openings of to-day are to be sought in the newer countries, and whether I would advise young men to seek their fortunes abroad rather than at home. But does not this question presuppose another, namely, "What is the supreme object of life?" Is it money—or knowledge—or power—or honour? Is it abounding luxury or moderate comfort? Then, again, who and what is the young man I am asked to advise? Has he idled away his youth and early manhood in sport? In society he may be a lion; but in the City a fool.

So in answering the question one has to discriminate. To the brilliant man—industrious, sober, healthy, ambitious—I should say "Stay at home, your country needs you. There are endless prizes in store. Old England is not played out." Take the London directory, or look down the list of the big merchants of any of our provincial cities. How is it there are so many German, Italian, Greek, and other foreign names? Many figure as partners in the largest firms, financial or manufacturing. How is this? Often because the son of the founder of the firm has missed his chance, or idled away his time at the public school or the University. Had he spent on his father's business, or thrown into commerce, one-third of the energy and skill—for he has both—which he shows at polo, the German partner would not be there, and the glories of the old firm in modern days would have far eclipsed those of old.

Britain is still the money centre of the world. Neither Paris nor New York, still less Berlin, has outstripped London. To the young man, therefore, of commercial genius, with a strong physique and a well-balanced brain, I would say, "Make your fortune at home and invest it abroad". You ask where—In the British Dominions across the seas? In the seductive republics of South America? In Russia with its vast natural resources? In China, at last arousing herself from ages of lethargy, and flinging open her doors to Western enterprise and adventure?

There is no limit to the number of efficient and up-to-date workers whom these countries can absorb and enrich—chemists, mining engineers, textile experts, railway men, constructors of all sorts, iron and steel workers, makers of machinery—all are

needed. But they must speak the language, and understand the habits of the people among whom they intend to live. May I add that the more Britons travel the less flamboyant they become?

Is success only for the man with capital? I would quote two authorities, one ancient, one modern, who may throw some light upon this all-important question. When Crœsus boastfully displayed to Solon his vast stores of gold, Solon answered: "Sir, if any other come that hath better iron than you, he will be master of all this gold". So much for the ancient philosopher. Now for the modern. "Some men have money and no brains; and some men have brains and no money. Surely the men with brains and no money were made for the men with money and no brains." It has been so in all ages. It is so in every land to-day. Capital and Labour, and I mean labour with the brain as well as the hand, are twin sisters. They cannot be separated. The hand cannot say to the foot "I have no need of thee".

As long as some men are clever and some stupid, some strong and others weak, some rich and others poor, some thrifty and others extravagant, some theorists and others practical, some lazy and others industrious, so long will there always be a place and an opportunity for competent Britons, whether they have money or not, in almost any land in which a Briton can live.

Does self-help play as important a part in determining success as in days gone by? One of our politicians, holding high office, recently said: "You want to cultivate in the State a sense of proprietorship over the workers". That is what the Czar of Russia says. It is what the old slave owners believed. If I thought it, I would despair of old Britain, and dark indeed would be the outlook for her self-reliant sons and daughters. But happily I believe just the opposite. To surround men with inspectors from their cradles to their graves is an economic fallacy which will soon be found out and played out. As long as men think and act for themselves and refuse to take the marching orders of their lives from State officials, so long will "self-help" play as important a part as of yore in the lives of Britain's enterprising sons.

I do not agree with the pessimistic views as to the commercial and financial condition of our country sometimes expressed. While there is the utmost possible necessity for cutting down public expenditure to the lowest point consistent with economy and public safety, I do not think there is the slightest need for us, as a commercial and industrial community, to get into a state of panic and to imagine that we are not perfectly capable of meeting any claims that may come against us either on capital or revenue account.

No, the old country is not played out. In business it still needs you, and you need it. To the right class of men, trained and keen, there are endless prizes in store. It is for *you* to grasp them by your industry, honesty, and ability.

PART III

THE LAW OF COMMERCE AND BUSINESS

(*Continued*)

CHAPTER VII

NEGOTIABLE INSTRUMENTS

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The law of negotiable instruments, so far as regards bills of exchange, promissory notes, and cheques, has been codified by the Bills of Exchange Act, 1882. The Act applies to the whole of the United Kingdom, it having been found possible to bring the law of Scotland into line with that of England and Ireland. With few exceptions the codifying Act is declaratory of the pre-existing common law of the land, so that the cases decided in the Courts prior to 1882 are still useful to elucidate difficult points; but where there is any conflict between the cases and the Act, the Act must prevail.

It will be found necessary in many cases to refer to various parts of this chapter in order fully to understand all the difficulties or doubts which may easily arise in connection with one particular bill of exchange. Throughout, a bill of exchange will be for the most part referred to as a bill, and a promissory note as a note.

BILLS OF EXCHANGE

A bill of exchange is an *unconditional* order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a *fixed* or *determinable* future time a sum certain in money to or to the order of a specified person or to bearer. Thus, to take for the present a clear example, the following is a bill:—

Form 1

£500. *4th Jan., 1911.*

Three months after date hereof pay to John Jones or order the sum of Five Hundred Pounds for value received.

Alfred Smith.

To John Roberts,
160 Lombard Street,
London, E.C.

Accepted payable at Coutts's Bk., Strand—John Roberts.

An order which does not comply with the above-mentioned conditions, or which directs any act to be done in addition to the payment of money, is not a bill of exchange. Thus, the request to pay must be an *order*, not a prayer, although any form of expression, whether couched in polite terms or not, would be sufficient. The word "pay" is the most common expression, but "credit Mr. Jones" would do, whereas "I *trust* you will pay Mr. Jones" would not.

The order to pay must be unconditional. "Pay if my daughter marries your son" would not be good. A bill is often referred to as a draft, because it is drawn by one person on another. It may be written in any language, and so long as it is an order to pay a sum certain in money, the money may be expressed in any currency—British, French, or otherwise. An order to pay out of a particular fund is invalid as being conditional. Thus "Pay £100 out of the moneys you hold of mine". The order to pay is conditional on the fund proving sufficient. But this case must be distinguished from an unconditional order to pay with an indication how the person ordered to pay is to reimburse himself, e.g. "Pay £100 to my order and charge my account".

The period of payment may be uncertain if the event is one which must at some time or other occur. Compare "Pay £100 upon the arrival of the good ship *Pegasus*" with "Pay £100 upon the death of the Captain of the good ship *Pegasus*". The former is a bad bill, because the ship may never arrive; the latter is a good one, because the event must happen.

There is no objection to stating the transaction which gives rise to the bill, and it is commonly done.

Although the bill may be bad as such, and therefore not a negotiable instrument, it nevertheless may be useful for other purposes; for example, as evidence of an agreement.

The person to whom the order to pay is directed is termed the drawee, and the person who orders him to pay is the drawer; if the drawee acknowledges the order to pay he becomes the acceptor. The person to whom the sum of money is to be paid is termed the payee. Thus, in Form 1 Alfred Smith is the drawer, John Roberts is the drawee, and Mr. Jones is the payee.

It is very common to insert, as in Form 1, that the payment is for "value received". In the United Kingdom, although the custom is different in most other countries, it is unnecessary to insert the words; and, even if they are inserted, it is not conclusive of the fact, and evidence may be given as between immediate parties to prove that in fact no consideration was given.

Nor is a bill bad in this country by reason of the fact that it does not specify the place where it is drawn or where it is payable.

If a bill is not dated, it is not for that reason invalid; there is an implied authority to fill in the date.

Inland and Foreign Bills

Bills are distinguished as Inland and Foreign Bills. An inland bill is a bill which is, or on the face of it purports to be, (*a*) both drawn and payable within the British Islands, or (*b*) drawn within the British Islands upon some person resident within the British Islands. Any other bill is a foreign bill. Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill. For this purpose "British Islands" means any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Jersey, Guernsey, Alderney, and Sark, and the islands adjacent to them, being part of the dominions of His Majesty.

For purposes of stamp duty, every bill drawn or made out of the United Kingdom is a foreign bill. (See Chapter XXVIII of this Part.)

A bill may be drawn payable to or to the order of the drawer (Form 2), or it may be drawn payable to or to the order of the drawee (Form 3).

Form 2

London, 1st Jan., 1911.

£500.

Three months after date pay to my order the sum of Five Hundred Pounds for value received.

Alfred Smith.

To John Roberts,
160 Lombard Street,
London, E.C.

Form 3

London, 1st Jan., 1911.

£500.

Three months after date pay yourself or order the sum of Five Hundred Pounds for value received.

Alfred Smith.

To John Roberts,
160 Lombard Street,
London, E.C.

It is not very usual, no doubt, to draw a bill payable to the order of the drawee, but such a bill is negotiable once the drawee endorses it. Unless he does so the bill is useless. On the other hand, nothing is more common than to draw a bill payable to the order of the drawer.

Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract (as to which see below), the holder may treat the instrument at his option, either as a bill of exchange or as a promissory note. If the bill is met and paid as a bill, well and good; but if not, then the holder may deal with it as a note.

The drawee must be named or otherwise indicated in a bill with reasonable certainty, otherwise the holder will not know to whom to apply for acceptance, and no person will know if he has the right to pay it. Hence, if a person to whom it is not addressed does accept it, he is not liable as such although he may be liable as the maker of a promissory note, for he promises to pay. But it will be otherwise if the drawee is sufficiently indicated although not named; for example, if the order to pay is addressed to 160 Lombard Street, and Mr. John Roberts lives at that address and accepts, the bill is a good bill.

A bill may be addressed to two or more drawees, whether they be partners or not, but an order addressed to two drawees in the alternative, or two or more drawees in succession, is not a bill of exchange. Herein a bill of exchange differs from a promissory note. The acceptors of a bill can only have a joint liability, whereas the makers of a promissory note, who occupy in most respects the position of acceptors, may be jointly and severally liable.

If all the drawees to whom the bill is addressed do not accept, the acceptance is a *qualified* one, which will be explained below.

Payee

Where a bill is not payable to bearer (and it is not usual to make a bill so payable) the payee must be named or otherwise indicated therein with reasonable certainty. If a blank is left for the name of the payee, e.g. "Pay £100 to .... or order", the person in possession of it has a *prima facie* authority to fill up the omission in any way he pleases. (See below. "Inchoate Instruments".) If the name of the payee is misspelt, or he is wrongly designated, he may endorse the bill as therein described, adding if he chooses, his proper signature.

A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two or some of several payees. A bill may also be made payable to the holder of an office for the time being, thus: "Pay to the order of the Secretary for the time being of the London Sports Club".

Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer. If the payee is fictitious, his endorsement is fictitious, but this does not in any way affect the holder who takes it in good faith; if the holder takes it knowing that the payee is fictitious, he himself is entitled to endorse it with the fictitious person's name. Of course if there is any fraud in connection with the use of a fictitious name, nobody can claim under the bill who has knowledge of that fraud. A bill made payable to a deceased person is to a non-existing person. The signature of a fictitious or non-existing person must be distinguished from the forged signature of a real person, and the name of a fictitious or non-existing person must be distinguished from the fictitious name of a real person, for any person may trade in or assume a name not his own. The name of a real person may nevertheless be ficti-

tious if the person who inserts it does not intend the person to be the payee. This question is often of the greatest importance when it is necessary to determine upon whom is to fall the loss resulting from a forgery. It will be best to illustrate the difficulty by reference to two well-known cases decided in the House of Lords, one of them dealing with bills of exchange, the other with a cheque, which is a particular form of a bill of exchange.

In the first case, *Vagliano Brothers v. Bank of England* (1889), a clerk in the employ of the plaintiff firm had obtained payment of bills to the value of £71,500 by a skilfully devised fraud. Vagliano Brothers were in the habit of accepting bills drawn upon them by a foreign customer named George Vucina. In these bills the payee was on many occasions a firm in Constantinople named C. Petridi & Co. Accordingly the clerk placed bills before his principals for acceptance which purported to be drawn by George Vucina payable to C. Petridi & Co. In fact the signature of George Vucina was forged. When the bills had been duly accepted, payable at the Bank of England, the clerk forged the endorsement of C. Petridi & Co., and then presented the bills in due course for payment at the Bank of England, when they were honoured to the amount above stated. On discovery of the fraud, Vagliano Brothers sued the Bank of England to recover the £71,500 with which their account had been debited. The House of Lords decided, however, that the Bank of England were not liable to refund, because under the circumstances C. Petridi & Co. were fictitious persons, and therefore the bills were to bearer, and the endorsement was not a forgery. Consequently, the bills being bearer bills, the Bank had authority to pay any person who presented them for payment. No doubt C. Petridi & Co. were real persons, but the person who inserted their name had no intention of regarding them as real persons, for they were never to be payees in any sense, and any other name which would have alleviated suspicion would have done as well.

In the second case, *Macbeth v. North and South Wales Bank* (1908), one White induced Mr. Macbeth to finance him in purchasing certain shares from a man named T. A. Kerr. Accordingly Mr. Macbeth drew a cheque on his bank, the Clydesdale Bank, for £11,500, payable to T. A. Kerr or order. White forged T. A. Kerr's endorsement and paid the cheque into his own bank, the North and South Wales Bank, who duly credited his account with the amount. In fact Mr. T. A. Kerr had no such shares, and the whole thing was a fraud by White. Accordingly, the Clydesdale Bank having paid the cheque, Mr. Macbeth sued the North and South Wales Bank for having received the proceeds of a forged cheque (the liability of a banker in such a case has been now altered by Act of Parliament, as discussed on p. 28). The North and South Wales Bank, by way of defence, argued, upon the authority of *Vagliano Brothers v. Bank of England*, that the payee, Mr. T. A. Kerr, was for the purpose a fictitious person, and the cheque was consequently a bearer cheque. But the House of Lords held otherwise; the drawer of the cheque actually intended that Mr. T. A. Kerr, a real person, should receive the cheque and deal with it, but he never did; consequently the North and South Wales Bank had to refund the £11,500.

Negotiable Bills

When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties but is not negotiable. Thus a bill, "Pay £100 to the order of Mr. Jones only", cannot be negotiated by Mr. Jones. The words prohibiting transfer must be clear and unambiguous, otherwise they will have no effect.

A negotiable bill may be payable either to order or to bearer. "Bearer" means the person in possession of a bill or note which is payable to bearer. A bill is payable to bearer which is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank. Thus, if Mr. Jones, the payee, endorses the bill simply and negotiates it, the bill becomes a bill payable to bearer; or he may endorse it to the order of A. Wills, and A. Wills may simply endorse it over to another person, in which case the bill is a bearer bill owing to the act of A. Wills. A bill endorsed in blank, that is, where no endorsee is specified, may be converted by any holder into a specially endorsed bill, that is, one that specifies the person to whom or to whose order the bill is to be payable. In the endorsements of a bill given in Form 4, Jones is the payee who endorses the bill to Wills or order, Wills adds his signature, to make himself liable, and negotiates it to James Welch; that is an endorsement in blank, and the bill is a bearer bill. James Welch endorses it in blank and negotiates it to A. Hands, the bill still remaining payable to bearer, and so A. Hands endorses it and negotiates it to P. Colne. Colne now specially endorses it to F. Kerr or order, so that the bill is no longer negotiable until F. Kerr endorses it, which he does in blank, making the bill once more payable to bearer. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should

Form 4

Pay A. Wills or order
O. Jones.

A. Wills.

James Welch.

A. Hands.

Pay F. Kerr or order
P. Colne.

F. Kerr.

not be transferable. In Form 4 above, the bill would have been payable to the order of A. Wills even though the endorsement of O. Jones had been simply "Pay A. Wills". Note the distinction between a special endorsement, such as that of O. Jones, P. Colne, and an endorsement in blank, such as that of James Welch, A. Hands, and F. Kerr. Where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option. Thus "Pay to the order of O. Jones"; O. Jones may himself demand payment; he is not bound to negotiate the bill or to endorse it.

The Sum Payable

It was stated above that a bill is an order to pay a sum certain in money. The sum is certain although it is to be paid (*a*) with interest—there is no limit to the rate of interest, subject to this, that if the transaction is a money-lending one with a money lender, the rate of interest may be reduced under the powers given to the Court by the Money Lenders Act, 1900 (see Chapter XII of this Part); (*b*) by stated instalments, but a bill "Pay by instalments £2000" is not valid because the instalments are not stated; (*c*) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; (*d*) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill. Where a bill is drawn in one country upon a person resident in another country in the currency of the former country, the rate of exchange in the case of dishonour is that existing on the day that the bill became payable, unless otherwise indicated on the bill. It was pointed out in the case of *Suse and Others v. Pompe and Another* (1860), where the bill was drawn for £750 upon a firm in Vienna, that the holder was entitled to receive a certain number of Austrian florins in Vienna on the day when the bill was at its maturity. He had in effect bought from the endorser so many Austrian florins to be received in Vienna on that day. It should follow that on non-payment on that day by the drawee the holder is entitled as against the endorsee, not to £750, but to as much English money as would have enabled him in Vienna on that day to purchase as many florins as he ought to have received from the drawee, and, further, to the expenses necessary to obtain them.

Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. It is usual to express the sum payable in figures in the margin, and in words in the body of the instrument, as in Form 1.

Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and, if the bill is undated, from the issue thereof, that is, when it is first delivered *complete* in form to a person who takes as holder of it. Interest in the case of dishonour can in any case be claimed as damages—a matter dealt with later.

Interest does not affect the stamp duty.

Bill Payable on Demand

A bill is payable on demand which is *expressed* to be payable on demand, or at sight, or on presentation, or in which no time is expressed. There are no days of grace attached to a bill payable on demand. Where a bill is accepted or endorsed

when it is overdue (as to which see below) it is, as regards the acceptor who so accepts or any endorser who so endorses it, deemed a bill payable on demand.

Payable after Date

Where a bill expressed to be payable at a fixed period after date is issued undated, or where the *acceptance* of a bill payable at a fixed period after sight is undated, any holder may insert therein the *true* date of issue or acceptance, and the bill is payable accordingly. If the holder, by mistake, inserts a wrong date the bill is not avoided, but operates and is payable as if the date so inserted had been the true date. The holder must do his best to fill in the true date, and if he does his best he is quite safe; for example, if the bill comes from abroad, he can calculate the time approximately taken in the course of transmission by post. If a bill is delivered undated, there is a *prima facie* authority to fill up the omission in any way the holder thinks fit. Even though a wrong date is inserted intentionally, it would not affect the rights of a holder in due course. The date on a bill is deemed to be the true date until the contrary is shown. Where it is material to show that in fact the date is not the correct date, evidence may be given to establish the fact. A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

Time of Payment

As already stated, a bill payable on demand is payable on the day when demand is made. In all other cases three days, called days of grace, are, where the bill does not otherwise provide, added to the time as fixed by the bill, and the bill is due and payable on the *last* day of grace. But when the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is (one case excepted) due and payable on the preceding business day. Any day is a business day except the above-mentioned special days.

When the last day of grace is a bank holiday (other than Christmas Day and Good Friday) under the Bank Holidays Acts, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding *business* day. Thus, if the last day of grace falls on a Sunday, payment is due on the succeeding *business* day, that is, the Monday if that is a *business* day.

Where a bill is payable at a fixed period after date, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. Thus, a bill dated Monday, 1st January, 1910, payable fourteen days after date, is payable on Thursday, 18th January, 1910. As the party liable on the bill has up to the last moment on Thursday in which to pay, no action can be commenced until the day after—*Kennedy v. Thomas* (1894).

Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, or, in the case of a promissory note, from the time it is exhibited to the maker; if the bill is to be noted or protested for non-acceptance or for non-delivery, the time begins to run from the noting or protesting.

The term "month" in a bill means calendar month.

Referee or Drawee in Case of Need

The drawer of a bill and any endorser may insert therein the name of a person to whom the holder may resort *in case of need*, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called *the referee in case of need*, or sometimes *the drawee in case of need*, or *case of need* simply. It is in the option of the holder to resort to the referee in case of need or not as he may think fit, that is to say, he may ignore him altogether and proceed against the parties liable on the bill A dishonoured bill must be protested for non-payment before it is presented for payment to the referee in case of need.

Express Stipulations

The drawer and any endorser may limit his own liability to the holder by inserting an express stipulation in the bill to that effect. A very usual limitation is expressed in the words "without recourse" or "sans recours", but no particular form of expression is necessary.

So by an express stipulation the drawer and any endorser may waive *as regards himself* some or all of the duties of the holder. Thus if he has shrewd suspicion that the bill will not in fact be paid on maturity, he might, in order to save expense, waive his right to receive notice of dishonour from the holder by endorsing a stipulation to that effect on the bill.

Acceptance

As has been pointed out, a bill is an unconditional order in writing to pay a sum of money, addressed by the drawer to the drawee. The *acceptance* of a bill is the signification by the drawer of his assent to the order of the drawee. When the drawee signifies his assent he becomes the acceptor. No person can be the acceptor unless the bill is addressed to him, except in the case of an acceptance for honour and the case under the Companies Act, to be dealt with later. Thus, if the bill is addressed to A and accepted by B, B is not liable because it is not addressed to him. If the bill is addressed to nobody at all, no person can be liable thereon as acceptor even though he purports to accept as such; he may, however, be liable as maker of a note. If a bill is addressed to a firm, and accepted in the firm's name, the firm is liable. It should be noted that the firm's name is only a compendious way of stating the names of the individual partners; hence if a bill is addressed to B, and he accepts it in the name of the firm, B alone is liable.

A bill or promissory note is deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of or by or on behalf of or on account of the company by any person acting under its authority. This assumes, of course, that the company has power to issue bills and notes. (See Chapter IV of this Part.) An acceptance must be signed by the drawee or his authorized agent. The word "accepted" or equivalent need not be used, although it is usual to accept by writing "accepted" and signing underneath. (See Form 1 above.) The acceptance must not express that the drawee will perform his promise by any other means than the payment of money, e.g. "Accepted payable in goods per s.s. *Trent*" would be a bad acceptance.

Time for Acceptance

A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, when it is overdue or after it has been dishonoured by a refusal to accept or by non-payment, so that the holder is put in the same position as if there had been no dishonour. It is usual to leave a bill twenty-four hours for acceptance, the date of the acceptance being the date of presentment and not the date of the return of the bill duly accepted to the holder. If there is nothing on the bill to indicate the date of acceptance it is presumed to have been accepted before maturity and at a reasonable time after issue. When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder in the absence of any different agreement is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance; this is only in accordance with good sense, as it would be unfair to put the holder in a worse position as regards date of payment by reason of the default of the drawee.

General and Qualified Acceptance

A *general* acceptance assents without qualification to the order of the drawer. A *qualified* acceptance in express terms varies the effect of the bill as drawn. A holder is not obliged to take a qualified acceptance. In particular, an acceptance is qualified which is—

(*a*) A conditional acceptance, that is to say, one which makes payment by the acceptor dependent on the fulfilment of a condition therein stated. Note that although the order by the drawer to pay must be unconditional, the acceptance may be conditional, e.g. "accepted provided the goods are delivered in marketable condition" is a good acceptance if the holder chooses to be content with it.

(*b*) A partial acceptance, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.

(*c*) Local acceptance, that is to say, an acceptance to pay only at a particular specified place. Note that an acceptance to pay at a particular place is a general acceptance unless it expressly states that it is to be paid there *only* and not elsewhere. Thus "accepted payable at Parr's Bank" is a general acceptance, whereas the following acceptance is qualified: "Accepted payable at Parr's Bank and nowhere else".

Inchoate Instruments

The case where a bill is issued undated has already been dealt with. Where a simple signature on a blank *stamped* paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an endorser; and in like manner when a bill is wanting in any material particular, the person in possession of it has such an authority to fill up the omission in any way he thinks fit. The paper must be *stamped* paper. There is no authority to fill up as a bill a blank paper signed by a person and then stamp it. It should be further noticed that it must be

delivered in order that it may be converted into a bill, otherwise there is no authority—*Baxendale v. Bennett* (1878).

It will be noticed that the delivery of the inchoate instrument is only a *primâ facie* authority to complete it. If it is not completed in fact in accordance with such authority, then it is necessary to distinguish the case of the holder in due course from one who is not.

Provided the blank or inchoate stamped paper is delivered, a holder in due course can enforce the bill even though it was not completed within a reasonable time and strictly in accordance with the authority given. As will be seen later, a person cannot be a holder in due course unless he took the bill complete and regular on the face of it.

But an inchoate instrument when completed can only be enforced by a person who is not a holder in due course, against any person who became a party thereto prior to its completion, if the instrument was filled up within a reasonable time and strictly in accordance with the authority given.

Providing the person to whom the inchoate instrument is delivered takes it for value, he is entitled to complete the instrument even after the death of the signer. It is otherwise if no value is given, as, for example, in the case of an accommodation bill. What is a reasonable time for filling up a blank signature is a question of fact to be decided in each case as it arises.

Delivery

Delivery means transfer of possession from one person to another. Every contract on a bill, whether it be the drawer's, the acceptor's, or an endorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto, save that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

Thus, for example, if a bill is left by the holder with the drawee for his acceptance, and the drawee puts his signature to it, he may cancel it at any time before he delivers the bill to the holder, unless he has already given notice to him that he has accepted.

It is to be observed that a bill is a contract in writing, of a special kind no doubt, and, like other contracts in writing, if an action is brought upon it, parol evidence cannot be given to prove a variation of the written contract. For example, if the bill is expressed to be payable three months after date, evidence is not permissible to prove that it was agreed that the bill should be payable two months after date (see Chapter I of this Part). Evidence, however, may be given to prove that no consideration was given for the bill, or that the bill has been paid.

There are many parties to a bill; those in immediate relation to each other are called immediate parties. For example, an endorser is an immediate party to the endorsee to whom he endorses the bill; whereas the next endorsee and himself are not immediate parties. So the drawer and payee are immediate parties. As between an immediate and a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party drawing, accepting, or endorsing as the case may be; an unauthorized delivery has no effect. So the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill; but if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively proved. To take an example: if A hands a bill to B to mind for him, and B hands it to C for no consideration, then C cannot sue A on the bill; but if C is a holder in due course he could recover on the bill.

Where the bill is no longer in the possession of a party who has signed it as drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

CAPACITY AND AUTHORITY OF PARTIES

Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. (See Chapter I of this Part as regards capacity of infants, women, &c., to contract.)

A corporation can only incur liability on a bill if it is expressly or impliedly authorized by its constitution to do so. All trading companies have an implied power to issue bills, but a non-trading company, as, for example, a literary society registered under the Companies Act, could not issue a bill unless its Memorandum of Association expressly empowered it to do so. (See Chapter IV of this Part.)

Where a bill is drawn or endorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder to receive payment of the bill from and to enforce it against any other party.

The bill, in other words, is quite valid, but the infant, &c., is not liable on it.

Signature Essential to Liability

No person is liable as drawer, endorser, or acceptor of a bill who has not signed it as such. A principal can authorize an agent to sign on his behalf, but it must not be the name of the agent, but of the principal. In this respect a bill of exchange differs from other contracts. The undisclosed principal cannot be made liable on the bill signed by the agent *in the agent's name*, although the authority of the agent is clearly proved. In such a case the only remedy against the principal is to sue on the original consideration. If, for instance, A instructs B to buy goods on his behalf, and to give a bill in respect of the purchase money, and B accordingly accepts a bill for the amount in his own name, then B only is liable on the bill, but the vendor can sue A for the purchase price. But if A had authorized B to accept the bill in A's name, A would have been liable once the authority was proved. The signature may be made in any way to show the assent of the signer; possibly a rubber stamp signature would be sufficient, but there is some doubt on the point. It would be sufficient if a man who could not write were to make his mark against his name written by somebody else.

Under some circumstances a person is not liable for his signature even to a holder in due course; if he were induced to sign a bill on the fraudulent representation that he was signing another document, he would not be liable providing he was not negligent. This may be illustrated by two well-known cases, viz. *Foster v. Mackinnon* (1869), and *Lewis v. Clay* (1897). In the first case Mr. Mackinnon was a gentleman of advanced years, who endorsed the bill for £3000 upon the fraudulent representation that he was only signing a guarantee for a railway company similar to that which he had given before and out of which no liability had resulted. The plaintiff, although a *bona fide* holder for value, could not recover on the bill. In the second case Mr. Clay was a young man without any business experience; he was requested by his friend to witness his signature on certain documents which were kept covered save for the space for the signatures, the reason given for not disclosing the contents being that they were of a private nature. Mr. Clay did so. It turned out that he had in fact signed as maker promissory notes to the value of £11,133. Mr. Lewis, the plaintiff, although a holder for value, did not recover on the notes.

In the case of a corporation it is sufficient to affix its seal; but it is not essential for the corporation to accept, draw, or endorse a bill under seal.

Where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed in his own name.

The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all the persons liable as partners in that firm. If in fact all the partners are liable as such then the signature of the partner suffices. It makes no difference so far as the holder in due course is concerned whether the bill was in the first place given for a private debt or not, the firm is liable on it if it is signed in the firm's name. But the partner, of course, must have authority as such to bind his co-partners. In all trading partnerships he has such authority, but in non-trading firms, e.g. professional partnerships, he has no such authority, and consequently a bill accepted by him in the name of the firm would not bind the firm unless given with the consent of the other partners. (See Chapter III of this Part.)

Forged or Unauthorized Signature

Where a *signature* on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative (except in one or two cases dealt with below), and no right to retain the bill or to give a discharge therefor or to enforce payment against any party to the bill can be acquired through or under that signature unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. A person may ratify an unauthorized signature, but cannot ratify a forgery.

Where the payee is a fictitious or non-existing person the endorsement in the name of such fictitious or non-existing person does not amount to a forgery. This case is dealt with above (p. 5).

A person may preclude himself from setting up that the signature purporting to be his has been forged; for example, if the intending holder for value applied to the acceptor to know if the signature purporting to be the acceptor's was in fact his, and the acceptor acknowledged such to be the case, the acceptor could not afterwards contend that it was a forgery.

It is to be noticed that a forgery defeats the title even of the holder in due course. So the title of the holder in due course is defeated where a bill is stolen from a holder and the holder's name is forged in the endorsement. In such a case the holder in due course has no title to the bill, and if

he is paid by the acceptor he must refund it to the holder from whom the bill was stolen.

The acceptor, however, by accepting the bill is precluded from denying to a holder in due course the genuineness of the drawer's signature; and an endorser is precluded from denying to a holder in due course the genuineness of the drawer's signature and all previous endorsements.

When a bill payable *to order or demand* is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority.

Where a banker *in good faith and without negligence* receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment. This is only a reasonable protection to the banker, who only does a ministerial act in collecting payment and who cannot possibly know, considering the number of cheques that pass through his hands daily, whether the customer is or is not entitled to it. The true owner must recover against the customer.

Before the banker can claim protection, the person presenting the cheque for collection must be a *customer*. Thus, in the *Great Western Railway v. London and County Bank* (1901), the bank was held liable to reimburse the Great Western Railway in respect of a cheque which the bank had collected and paid to a person who had no account with the bank, although the bank was in the habit of cashing cheques for him. Having no account he was not a customer.

Bankers were very alarmed by the decision of the House of Lords in the year 1903 in the *Capital and Counties Bank v. Gordon*. It had long been the custom of bankers to credit immediately a customer's account with a cheque paid in by the customer before the banker had actually collected it; if it turned out that the cheque was dishonoured, then the customer's account would be debited. But by crediting the account before collection, the banker in the eyes of the law became the purchaser of the cheque and the holder in due course, and so collected the cheque on behalf of himself and not his customer. This result in the above case proved that the banker could not claim protection if the customer had no title to the cheque, whereas he could have claimed protection if he had not credited the amount before actual collection. The decision in the House of Lords was extremely serious to bankers, as it was practically impossible to alter the well-established custom, which was a necessity to their customers. To get over the difficulty the Bills of Exchange (Crossed Cheques) Act, 1906, was passed, which gave bankers the same protection as they have when they collect for a customer before crediting the customer's account.

The forgery of a *signature* of a bill must be distinguished from the alteration of any other part of the bill, whether the alteration amounts to a forgery or not. The alteration of a bill is dealt with later in treating of the discharge of a bill (p. 24).

Procuration Signatures

A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent so signing acts within the actual limits of his authority. Hence a person receiving a bill with such a signature should take ordinarily prudent steps to ascertain the actual authority of the agent, if possible by the examination of written authority.

Person Signing as Agent

Where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal or in a representative character, he is not personally liable on the bill. But the mere addition to his signature of words describing him as agent or as filling a representative character does not exempt him from personal liability. Thus, if a person signs his name with the word "agent" underneath, he is nevertheless liable on the bill.

THE CONSIDERATION FOR A BILL

Bills may be given for valuable consideration or for no consideration. Valuable consideration is constituted by any consideration which is sufficient to support a simple contract. (See Chapter I of this Part.) The subject is an important one, and it should be particularly noted that the adequacy of the consideration is immaterial provided that there is some consideration. In England, as be-

tween immediate parties, no action can be brought on a bill for which no consideration has been given; in Scotland it is otherwise, provided that there is no fraud or other illegality to make the bill bad.

An antecedent debt or liability is sufficient consideration, whether the bill is payable on demand or at a future time.

Holder for Value

Where value has at any time been given for a bill, the holder is deemed to be a holder for value (in Scotland termed an "onerous holder") as regards the acceptor, and all parties to the bill who became parties prior to such time. It is immaterial that the holder in fact has not given value for the bill provided that some prior person has. To take an illustration: B, the drawer, draws a bill, payable to A, accepted by C. A endorses it for value to D, who endorses it for no consideration to E. E, as against A, B, and C, is a holder for value even though B and C may have received no consideration. A holder in due course is a holder for value, but the converse is not necessarily the case. Where the holder of a bill has a lien upon it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. A bill can be pledged, as distinguished from discounted; indeed it is quite a common form of security. In the ordinary way, when a bill is transferred it is deemed to be discounted; but if it can be established that it was only transferred by way of pledge, the pledgee can only retain for himself from the proceeds of the bill the amount of the pledge, and must account to the pledgor as to the balance. It is his duty to collect the bill and to give notice in case of dishonour.

A banker is an example of a person who has a lien arising by implication of law upon his customers' bills to the extent of the customer's overdrawn account.

If a pledgee knows that the pledgor has no authority to pledge, he cannot retain the bill against the true owner.

Accommodation Bill or Party

An accommodation bill is a bill in which the acceptor accepts without consideration the bill for the convenience of some other person.

An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or endorser without receiving value, and for the purpose of lending his name to some other person.

An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Although the acceptor of an accommodation bill is liable to a holder for value, nevertheless the principal debtor is in fact the person for whom the accommodation bill was accepted. Hence the bill is discharged when it is paid in due course by the party accommodated.

Presentment for payment, considered below, is dispensed with as regards the drawer where the drawee or acceptor is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented; similarly as regards the endorser, where the bill was accepted for the accommodation of that endorser. In like cases notice of dishonour or protest is dispensed with.

Holder in Due Course

A holder in due course is a holder who has taken a bill *complete and regular* upon the face of it under the following conditions: (*a*) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured if such was the fact; (*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it to him. As will be seen later, a holder in due course has very important rights, and it is therefore essential to appreciate who is a holder in due course. In the first place, the bill must be complete and regular on the face of it. A person who takes a bill in any material respect incomplete may have his rights defeated although he gave full value for it. The bill must not be overdue. Then the bill must be taken in good faith, that is, honestly; it is not honest to close one's eyes to circumstances of which one is suspicious. It must be taken for value, but the actual amount paid is immaterial. A £100 bill may be purchased for £50, and the purchaser may well be the holder in due course. In itself the amount given for a bill does not defeat the title of the holder, but it may be a material element if accompanied by other suspicious circumstances to influence the mind of the judge or jury that the person taking the bill at a serious undervalue had his suspicions as to the title of the person who negotiated it to him. If he has any notice of any defect in the title of the person who negotiated it, he cannot claim to be a holder in due course. Notice does not necessarily mean direct notice; it is sufficient if he has a suspicion that something is wrong. Unfortunately where there is fraud it is extremely difficult

to bring it home. The title of the person who negotiates it is defective, in particular, when he obtained the bill or the acceptance by fraud, duress, force or fear, or other unlawful means or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. It is quite common to give a bill on the understanding and promise not to negotiate it; to negotiate it in spite of such a promise is a breach of faith. It must be remembered that no person can obtain a title through a forged signature, whether value is given or not. A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder. It may be well to illustrate this. A, the drawer, draws a bill which is accepted by B, payable to the order of C, who endorses to D for value, who endorses it to E, a holder in due course for value, who endorses it to F, who endorses it to G for no consideration. As against A, B, C, and D, G has all the rights of E, a holder in due course; as against F, G has no rights, as he gave no consideration for the bill; as against E, G has only the same rights that F has, so that if the title of F is bad as against E, then the title of G is bad.

Presumption of Value and Good Faith

Every party whose signature appears on a bill is *prima facie* deemed to have become a party for value. The burden of proving the contrary lies upon the person who alleges it.

Every holder of a bill is presumed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill. It is important to notice in this last case that the holder must not only prove that value has been given subsequent to the fraud or illegality, but also that it was given in good faith (i.e. given by a party who did not know, or had no reason to know, of the illegality). The holder of a bill who has not given value takes it with the rights and liabilities of the party from whom he obtained it. Thus, if A accepts a bill for the accommodation of B, and B delivers it to C for no value, then, upon A proving the facts, C cannot recover on the bill against A, because C has no better rights than B, and B could not recover. Similarly, as against A, B may be entitled to recover part of the amount for which the bill was given but not the whole, in which case C could only recover such part: e.g. Jones orders a horse and carriage from Smith to be delivered next week, agreed price for the two £100; Jones gives Smith a bill at thirty days. Smith delivers the carriage, but not the horse. The consideration has partially failed, but Jones has no defence if sued on the bill by Brown, to whom Smith has endorsed the bill without consideration. Had Jones bought the horse for £40, and the carriage for £60, Jones would have had a good defence against Brown for £40.

Mere absence of consideration is no defence against a holder for value, with or without notice; but total failure of consideration is a good defence against a holder for value with notice.

NEGOTIATION OF BILLS

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. A bill payable to bearer (i.e. drawn payable to bearer or with the last endorsement in blank) is negotiated by delivery, and a bill payable to order is negotiated by the endorsement of the holder completed by delivery. When the holder of a bill payable to his order transfers it for value without endorsing it, the transferor gives to the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor. In such a case the bill is not negotiated, and the transferee could not sue on the bill in his own name. The Court would enforce his right to have the endorsement of the transferor, but he would be affected with any notice of fraud or illegality in the negotiation of the bill received before the endorsement. Where any person is under an obligation to endorse a bill in a representative capacity, he may endorse the bill in such terms as to negative his personal liability. If, for example, a corporation or a limited company transfer a bill for value without endorsing it, the transferee can demand its endorsement by the proper officers of the corporation or company as the case may be, but he cannot object to such officials signing in a representative capacity binding the corporation or company but negativing their personal liability.

Requisites of a Valid Endorsement

An endorsement in order to operate as a negotiation (when completed by delivery) must be written on the bill itself and be signed by the endorser. The simple signature of the endorser without additional words is sufficient. The endorsement is usually made on the back of the bill, but an endorsement on the face is valid. If there is no room on the bill for additional endorsements a slip of paper, called an *allonge*, may be attached to the bill and further endorsements made thereon. In such a case the new signature should commence on the bill and finish on the *allonge*, as this is necessary according to the law of some countries though not under English law. An endorsement written on an *allonge* is deemed to be written on the bill itself as is also an endorsement on a "copy" of a bill issued or negotiated in a country where "copies" are recognized. The endorsement must be of the entire bill. A partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negotiation of the bill. For instance, a bill for £100 is drawn by Jones and accepted by Brown for value. Jones endorses the bill "pay Smith or order £50, pay Robertson or order £50". The bill is not negotiated, and neither Smith nor Robinson severally or jointly could sue on the bill or negotiate it. Where a bill is payable to the order of two or more payees or endorsees who are not partners, all must endorse, unless the one endorsing has authority to endorse for the others. There is one exception to this, in the case of dividend warrants, as the Act specially recognizes the custom by which a dividend warrant payable to the order of two or more joint holders is honoured on the endorsement of any one of the payees. Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is misspelt, he may endorse the bill as therein described, adding, if he thinks fit, his proper signature. A married woman addressed in the name of her husband should endorse in her own name with the added description of her husband's name. Thus "Pay to the order of Mrs. Job Smith" should be endorsed "Doris Smith, wife of Job Smith".

Where there are two or more endorsements on a bill each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. An endorsement may be made in blank, when, as before-mentioned, the bill becomes payable to bearer; or special, i.e. specifying the person to whom or to whose order the bill is to be payable. It may also contain terms making it restrictive (as to which see below). Where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid whether the condition has been fulfilled or not. For instance, bill endorsed "Pay to the order of Carlos Ramona when s.s. *Ganges* clears for Calcutta"; the endorsement is in order, but the payee may disregard the condition. Where a bill has been endorsed in blank any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature a direction to pay the bill to the order of himself or some other person.

Restrictive Endorsement

An endorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as directed and not a transfer of the ownership, as, for example, "Pay D only", or "Pay E for collection". Such an endorsement gives the endorsee the right to receive payment of the bill, and to sue any party that his endorser could have sued. Accordingly, if the acceptor, or other party to the bill, is sued by the endorsee, a good defence against the endorser would be a good defence against the endorsee. A restrictive endorsement gives the endorsee no power to transfer his rights unless it expressly authorizes him to do so. In such a case all subsequent endorsees take the bill with the same rights and subject to the same liabilities as the first endorsee under the restrictive endorsement.

Negotiation of Overdue or Dishonoured Bill

Where a bill is negotiable in its origin it continues to be negotiable until it has been restrictively endorsed or discharged by payment or otherwise. An overdue bill is therefore negotiable, but it can only be negotiated subject to any defect of title affecting it at its maturity (mere absence of consideration does not appear to be a defect of title within the meaning of the Act). In other words, once a bill is overdue any subsequent holder, whether for value or not, is deemed to have notice of any defect of title affecting the holder at the time of its maturity.

A bill payable on demand (including cheques, but excluding promissory notes) is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time is

a question of fact in each case. A cheque two months after date has been held to be overdue. Except where an endorsement bears date after the maturity of the bill every negotiation is presumed to have been effected before the bill was overdue. Bills payable otherwise than on demand are overdue after the expiration of the last day of grace. In like manner any person who takes a bill dishonoured by non-acceptance, which is not overdue, *knowing* it has been so dishonoured, takes it subject to any defect of title attaching at the time of dishonour.

Negotiation of a Bill to a Party already Liable

Where a bill is negotiated back to the drawer, or to a prior endorser, or to the acceptor, such party may (subject to certain exceptions) re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable. If a bill be drawn by A payable to his order, and accepted by B, endorsed by B to C, by C to D, D then negotiates it back to A, A may re-issue the bill and endorse it to E, but he cannot as holder sue C or D, because he is liable to them as drawer. The exceptions to this right of re-issue and further negotiation are: (1) where the acceptor becomes the holder in his own right at or after maturity, (2) where an accommodation bill is paid in due course by the party accommodated, (3) where a bill payable to the order of a third party is paid by the drawer.

The Rights of the Holder

The rights and powers of the holder of a bill are as follows:—

1. He may sue on the bill in his own name.
2. Where he is a holder in due course he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.
3. Where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill.
4. Where his title is defective, if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

GENERAL DUTIES OF THE HOLDER

Presentment for Acceptance

In three cases it is necessary, subject to certain exceptions, to present a bill for acceptance before presenting it for payment. These three cases are:—

1. Where a bill is payable after sight, for in such case presentment for acceptance is necessary in order to fix the maturity of the bill. When such a bill is negotiated the holder must either present it for acceptance or negotiate it within a reasonable time, or the drawer and all endorsers prior to that holder are discharged. What is a reasonable time depends on the nature of the bill, trade custom with respect to similar bills, and the facts of the particular case.
2. Where a bill expressly stipulates that it shall be presented for acceptance.
3. Where a bill is drawn payable elsewhere than at the residence or place of business of the drawee. Should a bill drawn in this way come into the hands of the holder so near to its maturity that he has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and endorsers. For instance, A, B, & Co., London, receive by post on November 30 from a customer in Cape Town a bill for £400 drawn on C, D, & Co., Manchester, payable on December 1, at the X Bank, London. The bill is forwarded to Manchester for acceptance in the ordinary way and is received back and presented for payment on December 3. The delay is excused. The object of insisting upon prompt presentment for acceptance is to prevent other parties to the bill being damnified by any delay, for the acceptor is the first person liable on the bill.

Rules as to Presentment for Acceptance

Where presentment for acceptance is necessary, the following rules apply:—

(*a*) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue.

(*b*) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to

accept for all; then presentment may be made to him only. If one party refuses to accept, the acceptance by the others amounts to a qualified acceptance, the consequences of which are discussed below.

(*c*) Where the drawee is dead, presentment may be made to his personal representative.

(*d*) Where the drawee is bankrupt, presentment *may* be made to him or to his trustee.

(*e*) Where authorized by agreement or usage (as in England) a presentment through the post office is sufficient.

Excuses for Non-presentment for Acceptance

Presentment in accordance with the above rules is excused, and a bill may be treated as dishonoured—

(*a*) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill.

(*b*) Where, after the exercise of reasonable diligence, such presentment cannot be effected.

(*c*) Where, although the presentment has been irregular, acceptance has been refused on some other ground. The fact that the holder has reason to believe that the bill on presentment will be dishonoured does not excuse presentment.

Non-acceptance

When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he does not, the holder loses his right of recourse against the drawer and endorsers. In the case of trade bills, the "customary time" would be twenty-four hours, or more if a non-business day intervened. The bill must be left with the acceptor, if so desired, for twenty-four hours, and called for.

Dishonour by Non-acceptance and its Consequences

A bill is dishonoured by non-acceptance when, being duly presented for acceptance, such acceptance is refused or cannot be obtained, or when presentment for acceptance is excused and the bill is not accepted. A bill that has been dishonoured by non-acceptance may be subsequently accepted if the holder consents.

When a bill is dishonoured by non-acceptance an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary, but notice of dishonour must be given to these parties before any right of action accrues. (See further, "Notice of Dishonour".)

Duties as to Qualified Acceptance

The meaning of a qualified acceptance has been discussed above.

1. The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

2. Where a qualified acceptance, other than a partial acceptance, is taken, and the drawer or an endorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent, such drawer or endorser is discharged from his liability on the bill. Notice of such acceptance should at once be given to the drawer and prior endorsers, and if the drawer or any endorser does not, within a reasonable time, express his dissent to the holder, he is deemed to have assented. In the case of a partial acceptance, notice must also be given, but, this being done, as above indicated, the assent of the drawer or endorser is not required. Where a foreign bill is accepted as to part, it must be protested as to the balance.

Rules as to Presentment for Payment

A bill must be duly presented for payment, unless there is some valid excuse for non-presentment or delay. If it be not so presented, the drawer and endorsers are discharged. Not only are the drawer and endorsers discharged from the bill, but they are released from the obligation in respect of which the bill was given. It must be remembered that "the maker" of a promissory note is not "the drawer" within the meaning of these rules.

A bill is duly presented for payment, which is presented in accordance with the following rules:—

1. Where the bill is not payable on demand (as to which see above), presentment must be made on the day it falls due.

2. Where the bill is payable on demand, presentment must be made within a reasonable time in order to render the drawer liable (but as to the drawer of a cheque see further, "Cheques"), and within a reasonable time after its endorsement in order to render the endorser liable. In determining what is a reasonable time regard is had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

3. Presentment must be made by the holder or some person authorized to receive payment on his

behalf at a reasonable hour on a business day at the proper place, either to the person designated by the bill as payer or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found. If the bill be payable at a bank, presentment must be made within banking hours; if at a place of business, within ordinary business hours. A business day is any day other than Sunday, Christmas Day, Good Friday, or a Bank Holiday.

A bill is presented at the proper place—

(*a*) Where a place of payment is specified in the bill and the bill is there presented.

(*b*) Where no place of payment is specified, but the address of the drawee or acceptor is given on the bill, and the bill is there presented.

(*c*) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known.

(*d*) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last-known place of business or residence. Where a bill is presented at the proper place and, after the exercise of reasonable diligence, no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

Accordingly a bill drawn on Alfred Jones, of 101 Broad Street, London, which has been accepted "payable at the X Bank", must be presented at the X Bank. If no place of payment be specified, it must be presented at 101 Broad Street. If the address be not given, but the holder knows Alfred Jones carries on business at 101 Broad Street, then he must present it there, according to the rules given.

Where a bill is drawn upon or accepted by two or more persons who are not partners, and *no place of payment* is specified, presentment must be made to them all. Obviously, if one pays, further presentment is unnecessary; so if as agent of the others he refuses payment.

Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to the personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

A presentment through the post office is sufficient.

Excuses for Delay in Presentment for Payment

Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. The case of *Rouquette v. Overmann* (1875) illustrates this. There a bill on the face of it was payable in Paris on the 5th of October, 1870, but by a decree of the Emperor, made in consequence of the war with Germany, the time of payment for all bills of exchange was extended, and the bill did not become payable until September 5, 1871. It was then presented and dishonoured, protest and notice of dishonour following in due course. The defendants, who had endorsed the bill, were held liable to the endorsee notwithstanding delay in presentment.

Excuses for Non-presentment for Payment

Presentment for payment is dispensed with—

(*a*) Where, after the exercise of reasonable diligence, presentment, according to the rules just given, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured does not dispense with the necessity for presentment, even though it be well known the acceptor is bankrupt or a fugitive from justice, and has left the address given on the bill.

(*b*) Where the drawee is a fictitious person.

(*c*) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept and pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. For example, Jones wants to raise £50, and draws a bill at three months on his friend Smith, which Smith accepts for his accommodation, Jones promising to provide Smith with funds to meet the bill before it is due. Jones also obtains the signature of Brown as accommodation endorser, and then discounts the bill with Lewis. Jones does not provide Smith with funds to meet the bill. Lewis, owing to his negligence, fails to present the bill to Smith at maturity. Brown is, but Jones is *not*, discharged from his liability on the bill.

(*d*) As regards an endorser, where the bill was accepted or made for the accommodation of that endorser, and he has no reason to expect that the bill would be paid if presented. If in the example last given the bill had been drawn and accepted for the accommodation of Brown (the endorser) and he had failed to supply the acceptor with funds, Brown would have remained liable on the bill.

(*e*) By waiver of presentment express or implied.

Dishonour by Non-payment

A bill is dishonoured by non-payment—

(*a*) Where it is duly presented for payment and payment is refused or cannot be obtained, or

(*b*) Where presentment is excused and the bill is overdue and unpaid.

When a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder. But note that when payment is refused by the acceptor at any time on the last day of grace, the holder, though he may at once give notice of dishonour (see below) to the drawer and endorsers has no right of action until the expiration of that day.

Notice of Dishonour

Unless excused on one or other of the grounds stated below, when a bill has been dishonoured by non-acceptance or non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged, provided that—

1. Where a bill is dishonoured by non-acceptance and notice of dishonour is not given, the rights of a holder in due course, subsequent to the omission, are not prejudiced by the omission. So that though the holder of a bill, which on presentment is dishonoured by non-acceptance, has no recourse against the drawer and endorsers unless he gives notice of dishonour, yet if he negotiate the bill, subsequent holders in due course (i.e. holders for value who did not know that the bill had been presented for acceptance) are not affected by the omission.

2. Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it is not necessary to give notice of dishonour by non-payment unless the bill in the meantime has been accepted.

These rules deal with the question of notice of dishonour as regards parties to the bill. But it must be remembered that notice of dishonour should also be given to parties liable on the consideration for which the bill was given though they are not parties. If, for example, A sells goods to B and receives in payment a bill endorsed in blank by C. If the bill be dishonoured, B still remains liable on the consideration (i.e. the price of goods sold to him), but he will be discharged unless he is given notice of dishonour.

Rules as to Notice of Dishonour

Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules:—

1. The notice must be given by or on behalf of the holder, or by or on behalf of an endorser who at the time of giving it is himself liable on the bill. (*Note.*—An endorser who has not been notified in due time of the dishonour of a bill is not "himself liable on the bill".)

2. Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice whether that party be his principal or not.

The following illustration will show the effect of this rule. Bill drawn by A, endorsed by B, C, and D, held by E. It is duly presented to the drawee or acceptor by E's agent X, and is dishonoured by non-acceptance or non-payment as the case may be. X may give notice of dishonour to A in the name of either E, D, C, or B, or in his own name.

3. Where the notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior endorsers who have a right of recourse against the party to whom it is given.

4. Where notice is given by or on behalf of an endorser entitled to give notice (i.e. an endorser liable on the bill) it inures for the benefit of the holder and all endorsers subsequent to the party to whom notice is given.

5. The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.

6. The return of a dishonoured bill to the drawer or an endorser is, in point of form, deemed a sufficient notice of dishonour.

7. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by a verbal communication. A misdescription of the bill does not vitiate the notice unless the party to whom the notice is given is in fact misled.

8. Where notice of dishonour is required to be given to any person, it may be given either to the party himself or to his agent in that behalf (e.g. to a clerk in his counting house).

9. Where the drawer or endorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

10. Where the drawer or endorser is bankrupt, notice may be given either to the party himself or to his trustee in bankruptcy.

11. Where there are two or more drawers or endorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

12. The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time. What is a reasonable time depends on the facts in each case, but in the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(*a*) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(*b*) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post.

13. Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

14. Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after dishonour.

15. Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office

Excuses for Non-notice and Delay

Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

Notice of dishonour is dispensed with—

(*a*) When, after the exercise of reasonable diligence, notice cannot be given to or does not reach the drawer or endorser sought to be charged. It must be remembered that notice of dishonour must be given to the personal representative of a deceased drawer or endorser, and it is only when there is no personal representative, or when he cannot be found, that notice of dishonour is dispensed with. Although the acceptor is dead, or is bankrupt to the knowledge of the drawer or endorser sought to be charged, notice must nevertheless be given.

(*b*) By waiver, express or implied, either before or after the time of giving notice has arrived. For example, when the drawer of a bill tells the holder not to give him notice if the bill be dishonoured, as he will see him and arrange matters later on, notice of dishonour is waived. Likewise, if after the holder has failed to give notice of dishonour the drawer (or endorser) meets him and says: "I see the acceptor did not honour that bill; I shall take it up next week."

(*c*) As regards the *drawer* in the following cases:—

(1) Where drawer and drawee are the same person (e.g. X & Co., of Manchester, draw on their London house, X & Co., of London).

(2) Where the drawee is a fictitious person or a person not having capacity to contract. (See Chapter I of this Part.)

(3) Where the drawer is the person to whom the bill is presented for payment.

(4) Where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill (e.g. bill accepted for drawer's accommodation).

(5) Where the drawer has countermanded payment.

(*d*) As regards the endorser in the following cases, namely:—

(1) Where the drawee is a fictitious person or a person not having capacity to contract, and the endorser was aware of the fact at the time he endorsed the bill;

(2) Where the endorser is the person to whom the bill is presented for payment;

(3) Where the bill was accepted or made for his accommodation;

There is no need to give notice of dishonour to the acceptor. Notice of dishonour should be given to a person who, although not a party to the bill, is liable for the consideration for which the bill has been given; e.g. if A hands over a bill belonging to him, but upon which his name does not appear, in settlement of goods bought by him, he is entitled to notice of dishonour.

Noting or Protesting a Bill

Where a bill has been dishonoured by non-acceptance or non-payment, if it be an inland bill it *may* be formally re-presented through a notary and noted; if it be a foreign bill, it *must* be formally re-presented through a notary and noted and protested according to the rules given below.

By "noting" is meant the minute or note made by the notary or his clerk on the face of the dishonoured bill at the time of its dishonour. It consists of a reference to the notary's register (in which register the notary makes a full copy of the bill before sending it out), the noting charges, the

initials of the notary or his clerk who presented the bill, the date. For example, the notarial marks "C.R. 99. 1/6 R.B. 10th Dec. 1910" on a bill would mean that C.R. 99 is the page number of the notary's register, 1/6 is his charge for noting, R.B. the initials of the notary's clerk presenting, and 10th Dec., 1910, the date of such presentation.

A small ticket or label is attached to the bill giving the answer made at the dishonour of the bill, e.g.

"No orders"
1/6 A. B.
Notary, Manchester.

By "protesting" is meant the formal notarial certificates of dishonour subsequently extended from the "noting".

Requisites in Form of Protest

A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(*a*) The person at whose request the bill is protested.

(*b*) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given (if any), or the fact that the drawee or acceptor could not be found.

The following is a form of protest for non-payment:—

On the tenth day of December, One thousand nine hundred and ten, I, A.B., Public Notary, duly authorized, admitted, and sworn, practising at Manchester, in the county of Lancashire in the United Kingdom of Great Britain and Ireland, at the request of Tom Jones, of Blank Street, Manchester, did exhibit the original bill of exchange, whereof a true copy is on the other side written, unto a clerk in the counting house of John Smith, of Dash Street, Manchester, the person upon whom the said bill is drawn and by whom the same is accepted, and demanded payment thereof, and he answered that he had no orders to pay. Wherefore I, the said Notary, at the request aforesaid, have protested and by these presents do protest against the drawee of the said bill, and all other parties thereto, and all others concerned, for all exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of payment of the said Bill.

Which I attest,
Seal *A.B.*,
Notary Public,
Manchester.

On the back of the protest is a copy of the bill.

If the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate in all respects operates as if it were a formal protest of the bill. The following is a form of protest in such case, which may be modified as required:—

Know all men that I, M.D. (householder), of ....., in the county of ....., in the United Kingdom, at the request of N.E., there being no notary public available, did, on the .... day of ....., 19..., at ....., demand payment (or acceptance) of the bill of exchange hereunder written, from O.F., to which demand he made answer (state answer, if any), wherefore I now, in the presence of G.H. and A.K., do protest the said bill of exchange.

(Signed) *M.D.*

G.H., *A.K.*, } Witnesses.

Here follows a copy of the bill and all that is written thereon.

Noting Inland Bill

Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment as the case may be, but it is not necessary to note or protest any such bill in order to preserve the recourse against the drawer or endorser. Though no legal effect follows the noting of an inland bill it is useful as proving due presentment and is necessary before acceptance or payment for honour (see below).

Protest of Foreign Bill

When a foreign bill (but not a foreign note), appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested the drawer and endorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest in case of dishonour is unnecessary.

A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and

endorsers. That is, he may ask the acceptor to give security that the bill will be met when it falls due; security not being forthcoming, the bill is protested. The only effect is that the bill may be accepted for honour.

When a bill is noted or protested, subject to exceptions stated below, it must be noted on the day of its dishonour. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting. Accordingly, where a bill or note is required to be protested within a specified time or before some other proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding.

A bill must be protested at the place where it is dishonoured;

Provided that—

(*a*) When a bill is presented through the post office and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return, if received during business hours, and if not received during business hours, then not later than the next business day.

(*b*) When a bill drawn payable at the place of business of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Protest is dispensed with by any circumstances which would dispense with notice of dishonour. Delay in noting or presenting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars.

Duties of Holder as regards Drawee or Acceptor

1. When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

2. When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures. But it may be otherwise if the acceptor was damaged by delay in presenting.

3. In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

4. Where the holder of a bill presents it for payment, he must exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder must forthwith deliver it up to the party paying it.

LIABILITIES OF PARTIES

Funds in Hands of Drawee

A bill of itself does not in England and Ireland operate as an assignment (see Chapter I of this Part) of funds in the hands of the drawee available for the payment, and the drawee of a bill who does not accept is not liable on the instrument. In Scotland, where the drawee of a bill has in his hands funds available for payment, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

Accordingly, in England and Ireland the holder of a bill has no remedy against the drawee who refuses to accept, unless, as between the drawee and himself, the drawee has undertaken to do so. Further, when presentment for acceptance is not required (e.g. a cheque), the drawee incurs no liability to the holder by reason of non-payment, even though he has funds for the purpose.

As regards the drawer and drawee the position is this:—

" (*a*) The drawee is not bound to honour the drawer's bills by acceptance or payment unless he has expressly or impliedly contracted to do so, even though he is indebted to the drawer.

(*b*) A banker by reason of the relationship existing between himself and his client is bound to honour his client's cheques if they do not exceed the amount standing to the credit of the client's account.

(*c*) If the drawee dishonours a bill, by non-acceptance or non-payment, which he has contracted to accept, he becomes liable in damages to the drawer.

When the drawee accepts a bill payable at his bankers it is an authority to the banker to pay it, but he is not bound to do so, even though in funds, unless arrangements have been made to that effect. It must be remembered that the banker is not protected if he pays a bill on a forged

endorsement unless it be a bill payable to order on demand drawn on the banker.

Liability of Acceptor

The acceptor of a bill by accepting it—

1. Engages that he will pay it according to the tenor of his acceptance.

2. Is precluded from denying to a holder in due course—

(*a*) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(*b*) In the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement;

(*c*) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement.

Liability of Drawer and Endorser

The drawer of a bill, by drawing it (unless he has limited his liability by express stipulation)—

(*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, providing that the requisite proceedings on dishonour be taken;

(*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

The endorser of a bill, by endorsing it (unless his endorsement is qualified)—

(*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be taken;

(*b*) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements;

(*c*) Is precluded from denying to his immediate or a subsequent endorser that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then a good title.

When a person signs a bill, otherwise than as drawer or acceptor, he incurs the liabilities of an endorser to a holder in due course (e.g. bill endorsed in blank, and therefore payable to bearer and negotiable by delivery, is endorsed by the holder and passed on).

Having stated the liabilities of the various parties to a bill, it will be useful to note the position where one or other of the signatures to a bill has been forged.

It is no defence to an action on a bill for—

(*a*) The acceptor to show that the signature of the drawer is forged;

(*b*) An endorser to show that the drawer's or acceptor's signature or the signature of a previous endorser is forged.

It is a good defence to an action on the bill for—

(*a*) The acceptor or drawer to show that the signature of an endorser is forged when sued by a holder subsequent to such forged endorsement;

(*b*) An endorser to show that the signature of a later endorser is forged when sued by a holder subsequent to such forged endorsement.

Measure of Damages

Where a bill is dishonoured, the measure of damages which are deemed to be liquidated damages are as follows:—

1. If the bill is dishonoured in the United Kingdom, the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser—

(*a*) The amount of the bill;

(*b*) Interest from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case, but such interest may be withheld wholly or in part, and when a bill is expressed to be payable with interest at a given rate, interest under this clause may or may not be given at the same rate;

(*c*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of the protest.

2. If the bill is dishonoured abroad, in lieu of the above damages the holder may recover from the drawer, or an endorser, and the drawer or an endorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest until the time of payment.

The amount of the re-exchange is the sum for which a sight bill must be drawn on the drawer or endorser sought to be charged in order to realize at the place of dishonour the amount of the dishonoured bill, plus the expenses of protest, postage, commission and brokerage, and, if a re-draft is drawn, price of stamp. The holder may either sue the drawer or endorser in England or draw a sight bill (a re-draft) on him for the amount.

Transferor by Delivery and Transferee

Where the holder of a bill payable to bearer negotiates it by delivery *without endorsing it*, he is called a "transferor by delivery".

A transferor by delivery is not liable on the instrument. A transferor by delivery who negotiates a bill warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Though a transferor by delivery is not liable on the bill he may be liable on the consideration. As, for example, where a bill payable to bearer is given in payment of a debt, the presumption is that it is only conditional payment. The liability on the consideration would be suspended during the currency of the bill, but would revive on its dishonour. The question is, was the transfer of the bill intended to be a complete discharge of the liability in consideration of which it was transferred? If so, the transferor by delivery is completely discharged from his liability; if otherwise, his liability would revive on its dishonour. The question is one of fact, and is often difficult to decide.

DISCHARGE OF A BILL

A bill is discharged by payment in due course by, or on behalf of, the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder, provided that the payment is in good faith, and without notice that his title to the bill is defective.

As "payment" the holder is entitled to receive the amount of the bill in money, but he may agree to receive payment in any other form, subject to the ordinary rules as to accord and satisfaction. (See Chapter I of this Part.) If a bill endorsed in blank is stolen, the thief is the "holder", and payment to him would operate as a discharge, if the payer did not know "his title to the bill was defective". It would be otherwise if the bill was specially endorsed.

1. Where the holder of a bill *at* or *after* its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor.

2. The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity. Provided that, if the bill be negotiated subsequent to the renunciation, the rights of a holder in due course are not affected without notice of the renunciation.

When a bill is paid by the drawer or an endorser, subject to the exception stated in the next paragraph, it is not discharged but—

(*a*) When a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment against the acceptor, but may not re-issue the bill.

(*b*) When a bill is paid by an endorser, or when a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent endorsements, and again negotiate the bill. An overdue bill when negotiated is, as before stated, subject to any defect of title affecting it at its maturity.

Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

When the acceptor of a bill is, or becomes, the holder of it at or after its maturity, in his own right, the bill is discharged.

Cancellation

When a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent, the bill is discharged. In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any endorser who would have had a right of recourse against the party whose signature is cancelled is also discharged.

But a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, and when a bill or any signature thereon appears to have been cancelled, the burden of proving that the cancellation was made unintentionally, or under a mistake, or without authority, lies upon the person who alleges it.

Alteration of Bill

Where a bill on acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent endorsers. Provided that where a bill has been materially altered,

but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

In particular, the following alterations (amongst others) are material: Any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the acceptor's assent.

ACCEPTANCE AND PAYMENT FOR HONOUR

Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person (as for example the "referee in case of need", or some business connection of one of the parties to the bill who hears of the dishonour) may, with the consent of the holder, intervene and accept the bill "suprà protest" for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. The consent of the holder is necessary, for he may wish to exercise his right of recourse on non-acceptance as before mentioned. A bill may be accepted for honour for part only of the sum for which it is drawn.

An acceptance for honour "suprà protest", in order to be valid must—

(*a*) Be written on the bill, and indicate that it is an acceptance for honour; no special form of words is necessary, e.g. "Accepted for the honour of X. Y. suprà protest", or "Accepted S.P." would suffice;

(*b*) Be signed by the acceptor for honour.

Where an acceptor for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

Liability of Acceptor for Honour

The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawer, provided it has been duly presented for payment, and protested (or noted) for non-payment, and that he receives notice of these facts.

The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

Presentment to Acceptor for Honour

Where a dishonoured bill has been accepted for honour "suprà protest", or contains a reference in case of need, it must be protested (or noted) for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need. Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity, and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

Non-presentment or delay in presentment is excused by any circumstance which would excuse non-presentment for payment or delay in presentment for payment.

Where a bill of exchange, whether inland or foreign, is dishonoured by the acceptor for honour it must be protested for non-payment by him.

Payment for Honour "Suprà Protest"

Where a bill has been protested for non-payment any person may intervene and pay it "suprà protest" for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

Payment for honour "suprà protest", in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it. The following is an example of a notarial act of honour:—

> On the third day of January One thousand nine hundred and eleven, I, Robert White, notary public, duly admitted and sworn, dwelling in X in the county of Y, in the United Kingdom of Great Britain and Ireland, do hereby certify that the original bill of exchange for One thousand pounds, of which a copy is on the other side written (now protested for non-payment) was this day exhibited unto Arthur Black of Fenchurch Street, London, who declared that he would pay the amount of the said bill suprà

protest for the honour of James Mathew, the endorser, holding the drawer and all prior endorsers, and all other proper persons responsible to him, the said Arthur Black, for the said sum, and for all interest, damages, and expenses. I have, therefore, granted this notarial act of honour accordingly.

Which I attest,

Seal *Robert White,*
Notary Public.

This notarial act of honour must be founded on a declaration made by the payer for honour or his agent *in that behalf*, declaring his intention to pay the bill for honour, and for whose honour he pays.

Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, and the bill is no longer negotiable, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party. For example, a bill is paid by A. B. "suprà protest" for the honour of the second endorser: the third, fourth, and other subsequent endorsers are discharged. A. B., as succeeding to the rights of the holder, can sue the second endorser, and the first endorser, the drawer and acceptor if they are liable to the second endorser (it may be the bill was drawn, endorsed, and accepted for the accommodation of the second endorser, in which case they would not be liable). It must be remembered that A. B. also succeeds to the duties of the holder, and must give notice of dishonour if not already given.

The payer for honour, on paying to the holder the amount of the bill, and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest. If the holder does not on demand deliver them up, he is liable to the payer for honour in damages, providing, of course, that damages be sustained. Where the holder of a bill refuses to receive payment "suprà protest", he loses his right of recourse against any party who would have been discharged by such payment.

LOST INSTRUMENTS

Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request refuses to give such duplicate bill he may be compelled by the Court to do so. There is no power to obtain an endorsement or acceptance over again, but when the time for payment arrives a copy should be presented and an indemnity tendered. Should payment be refused, notice of dishonour must be given according to the general rules. As before mentioned, protest can be made on the copy of a lost bill.

In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question.

BILL IN A SET

Foreign bills are often drawn in a set, that is to say, two or more (usually three) copies or parts are made, each part being numbered and containing a reference to the other part. (See Form 5.)

The drawer signs all the parts, which together constitute one bill. Only one of the set requires a stamp, and upon proof of the loss or destruction of the stamped bill, any other bill of the set, if it has not been negotiated apart may be admitted in evidence, unstamped. The advantage of drawing a bill in a set is that though one part of the set may be lost or destroyed, the other part or parts can be negotiated and payment obtained in the regular way. In view of this the various parts may be transmitted from one holder to another at different times or by different routes, or one part may be forwarded for acceptance while the other parts are delivered to the endorsee.

As we have said above, all the parts are signed by the drawer, and they may be all endorsed by the payee or a subsequent holder; but if the payee or a subsequent holder endorses two or more parts to different persons (negotiates them apart) he is liable on every such part, and every endorser subsequent to him is liable on the part he has himself endorsed, as if the said parts were separate bills. As between the holders of the different parts, if holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill, but this does not affect

Form 5

LONDON, *January 3, 1911.*

£1000.

Three months after date of this first of exchange (second and third not paid) pay to *Messrs. Brown, Hill, & Co.* or order the sum of *One Thousand Pounds* value received.

James Black & Co.

To Messrs. J. Roberts & Co.,
Calcutta.

The second bill of the set would run: "this second of exchange (first and third not paid)," &c.; and so on.

the rights of a person who in due course accepts or pays the part first presented to him.

The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted part gets into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder.

Subject to the above rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

CHEQUES

A cheque is a bill of exchange drawn on a banker payable on demand. Except as provided under this head, the provisions applicable to a bill of exchange payable on demand which have been considered above apply to a cheque.

Subject to the excuses for non-presentment and delay in presentment, where a cheque is not presented for payment within a reasonable time of its issue and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. In determining what is a reasonable time, regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

The holder of such cheque as to which such drawer or person is discharged is a creditor, in lieu of such drawer or person, of such banker to the extent of such discharges, and entitled to recover the amount from him. For example, A draws a cheque for £50, which he remits to B in payment of an account. B fails to present the cheque for payment at A's bankers within a reasonable time. The bank subsequently fails. At the time of the failure A's account was in credit to the amount of £90. Had B duly presented the cheque the account would only have been £40 in credit. The extent of A's damage as provided by the rule is £50, and therefore the cheque is discharged; A is a creditor of the bank for £40, and B is a creditor of the bank for £50.

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

1. Countermand of payment.
2. Notice of customer's death.
3. Notice of act of bankruptcy or the making of a receiving order.

It is, of course, a serious matter if the banker fails to honour the cheque of a customer unwarrantably. (See Part IV.)

Dividend Warrants

A dividend warrant in the ordinary form is practically a cheque, and the undermentioned rules apply to such instrument as to a cheque.

The custom by which dividend warrants payable to two or more persons are paid on the endorsement of one or other of these is specially recognized by the Act.

Crossed Cheques

Where a cheque bears across its face an addition of—

(*a*) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable", or (*b*) two parallel transverse lines simply, either with or without the words "not negotiable".

That addition constitutes a crossing, and the cheque is crossed *generally*.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition constitutes a crossing, and the cheque is crossed *specially* and to that banker.

Rules as to Crossing of Cheques.

A crossing is a material part of the cheque, and it is not lawful for any person to obliterate or to add to or alter the crossing except as provided by the rules:—

1. A cheque may be crossed generally or specially by the drawer.
2. Where a cheque is uncrossed the holder may cross it generally or specially.
3. Where a cheque is crossed generally, the holder may cross it specially.
4. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable".
5. Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.
6. Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself (but see below).

Rights of the Holder of a Crossed Cheque

The rights of the holder of a crossed cheque, whether crossed generally or specially, without the words "not negotiable", are governed by the general rule applicable to bills; but where a person takes a crossed cheque which bears on it the words "not negotiable", he is not capable of giving a better title to the cheque than that which the person from whom he took it had. In other words, though it may be negotiated, such a cheque is negotiated subject to any defect of title.

Duties of Banker as to Crossed Cheques

Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection, being a banker, the banker on whom it is drawn must refuse payment.

Where the banker on whom a cheque is drawn which is so crossed nevertheless pays it, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment, which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, the banker paying the cheque in good faith and without negligence is not responsible nor does he incur any liability; nor can the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated.

Protection to Banker and Drawer where Cheque is Crossed

Where the banker *on whom* a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally to a banker, and if crossed specially, to the banker to whom it is crossed, or to his agent for collection, being a banker, the banker paying the cheque and, if the cheque has come into the hands of the payee, the drawer are respectively entitled to the same rights and placed in the same position as if payment of the cheque had been made to the true owner.

Protection to Collecting Banker

Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment. Further, it has been provided by the Bills of Exchange, Crossed Cheques, Act, 1906, that the banker "receives payment for his customer" though he credits his customer's account with the amount of the cheque before receiving payment.

Form 6 is a cheque drawn on the Southern

Banking Company, Ltd., crossed specially to the Northern Bank, and crossed again by the Northern Bank to their London agents, the Lombard Banking Company, for collection. It does not bear on it the words "Not negotiable". Accordingly—

Form 6

No. D. 2001. LONDON, *Jan. 4th, 1911.*

THE SOUTHERN BANKING COMPANY, LTD.,
LONDON.

Pay *Messrs. Christopher Black & Co., Limited,* or order
Ten Pounds, twelve shillings, stg.
£10 : 12 : — *Thomas Smith.*

& Co. Northern Bank, Ltd. Lombard Banking Company, Ltd. a/c Northern Bank.

1. If the paying bankers (Southern Banking Company) pay the amount of the cheque to the Lombard Banking Company in good faith, they incur no liability (unless the drawer's signature is forged, in which case they could not debit the amount to their customer's account).

2. If the cheque has come into the hands of the payees (Black & Co.), the drawer would not suffer even though the cheque be paid to a thief on a forged endorsement.

3. In this latter case also the collecting bankers (the Northern Bank by their agent the Lombard Banking Company) would be protected if the thief were a customer, otherwise if he were not.

4. The holder of this cheque, if a holder in due course, would, on presenting the cheque through a banker, be entitled to payment if the drawer's signature and the endorsement were in order, even though the cheque had been stolen.

Form 7 is a cheque drawn on and by the same parties as above, crossed generally, bearing the words "Not Negotiable".

Form 7

No. D. 2002. LONDON, *Jan. 4th, 1911.*

THE SOUTHERN BANKING COMPANY, LTD.,
LONDON.

Pay *Messrs. Christopher Black & Co., Limited,* or order
Five Pounds, fourteen shillings, stg.
£5 : 14 : — *Thomas Smith.*

& Co. Not Negotiable.

As regards this cheque, the drawer, the collecting banker, and the paying banker would be in the same position as in the last example, but, the crossing being general and not special, the paying banker discharges his duty by paying it *bona fide* to any banker presenting it for payment. The holder, however, whether the holder in due course or not, would not be entitled to payment, even though all the signatures were in order, if the title of his transferor or of a previous transferor were defec-

tive. Further, if such a holder did obtain payment he would have to refund the amount to the true owner.

Cheques are occasionally crossed "a/c payee" only. In such cases the collecting bank might be liable for negligence if it collected the cheque for any person other than the payee, unless good reason could be shown against negligence.

PROMISSORY NOTES

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed and determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer. An instrument in the form of a note payable to the maker's order is not a note within the above meaning unless and until it is endorsed by the maker.

Subject to the provisions under this head, the general rules relating to bills of exchange apply, with the necessary modifications, to promissory notes; but in applying these rules the maker of a note is deemed to correspond with the acceptor of a bill, and the first endorser of a note to correspond with the drawer of an accepted bill payable to drawer's order.

The following are the provisions as to bills which do not apply to notes:—

(*a*) Presentment for acceptance.
(*b*) Acceptance.
(*c*) Acceptance "supra protest".
(*d*) Bills in a set.

An example is given of a promissory note in the usual form (see Form 8).

If in this form the promise had been "to pay to self or order", it would not have been a promissory note until the maker, John Smith, had endorsed it.

Form 8

LONDON, *Dec. 28, 1910.*

£200.

Three months after date I promise to pay to *Mr. Arthur Green* or order *Two Hundred Pounds with interest at four per cent per annum.*

John Smith.

A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof; for example, "I promise to pay, &c., £1000, and hand herewith bonds to the value of £1000 to secure the due payment of same".

A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

A promissory note is inchoate and incomplete until delivery to the payee or bearer, but, as in the case of a bill, valid delivery is conclusively presumed if the note is in the hands of a holder in due course.

A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor. Makers cannot be liable severally without at the same time being liable jointly (see Chapter I of this Part).

Where the makers intend to be liable jointly and severally it is usual for the note to read: "We jointly and severally promise to pay, &c."; but where a note runs: "*I* promise to pay", and is signed by two or more persons, it is deemed to be their joint and several note.

Note Payable on Demand

Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. If it is not so presented the endorser is discharged.

In determining what is a reasonable time, regard must be had to the nature of the instrument,

WOOL BALES AT THE WHARVES FOR SHIPMENT, NEW SOUTH WALES, AUSTRALIA

the usage of trade, and the facts of the particular case.

As before indicated (p. 15), where a note payable on demand is negotiated it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, unless it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment for Payment

Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

Presentment for payment is necessary in order to render the endorser of a note liable, and where the note is in the body of it made payable at a particular place, the presentment must be made at that place; but where a place of payment is indicated by way of memorandum only, presentment at that place is sufficient, though a presentment to the maker elsewhere also suffices.

As to time of presentment, the general rules in this connection applicable to bills apply, remembering, as before stated, that the maker of a note corresponds to the acceptor of a bill.

If the form of the bill given on p. 30 (Form 11) had been made out: "I promise to pay Mr. Arthur Green or order at the Lombard Bank, London, £200, &c.", the note would have been made payable at a particular place in "the body" of the note. If the words "payable at the Lombard Bank, London", had been written, say, below John Smith's signature, or in one corner of the note, the place of payment would have been indicated "by way of memorandum", and presentment for payment accordingly might have been, but need not have been, made at that place.

Where a foreign note is dishonoured, protest is unnecessary, though it may be advisable for the purpose of charging any of the parties residing abroad.

Liability of Maker

The maker of a promissory note, by making it, engages that he will pay it according to its tenor, and is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

STAMPS

The regulations as to Stamps on Bills of Exchange and Promissory Notes are contained in the Stamp Act, 1891, as modified by Section 10 of the Finance Act, 1899. The scale of duties is as follows. on a—

	Stamp required.
Bill of Exchange (including a cheque) payable on demand, or at sight, or within three days after date or sight	1*d.*

Bill of Exchange of any other kind and Promissory Note of any kind whatever:

(*a*) Drawn or expressed to be payable in the United Kingdom:

Where the amount or value of the money for which the bill or note is drawn or made does not exceed—

	s	*d.*
£5	0	1
Exceeds £5, does not exceed £10	0	2
„ 10, „ „ 25	0	3
„ 25, „ „ 50	0	6
„ 50, „ „ 75	0	9
„ 75, „ „ 100	1	0
For every additional £100, and also for any fractional part of £100, of such amount or value	1	0

(*b*) Drawn or expressed to be payable *out* of the United Kingdom, when actually paid or endorsed or in any manner negotiated in the United Kingdom:

Where the amount or value of the money for which the bill is drawn does not exceed £50 the stamps are regulated as above (paragraph "*a*") i.e. 1*d.* stamp on £5, &c.

Exceeds £50 and does not exceed £100 ...	0	6
„ 100—		
For every additional £100 or fractional part thereof	0	6

A proviso for payment of interest does not affect the stamp duty.

All bills and notes other than bills payable on demand, and bills or notes drawn or made out of the United Kingdom, must be stamped before execution with an *impressed* stamp of sufficient amount to cover the duty payable.

The fixed duty of one penny on a bill of exchange payable on demand, or at sight, or on presentation, *may* be denoted by an adhesive stamp which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

A bill or note drawn or made out of the United Kingdom, or one which purports to be so drawn or made, must be stamped with an adhesive stamp or stamps of sufficient amount to cover the duty payable, and the stamps must be cancelled by the person affixing them, before it is in any way negotiated in the United Kingdom.

Every person who negotiates or pays (subject to the exception below) a bill or note not duly stamped is subject to a fine of £10, and the person taking the note cannot recover on it.

Provided that if any bill of exchange payable on demand, or at sight, or on presentation, is presented for payment unstamped, the payer may affix and cancel an adhesive stamp of one penny, and thereupon pay the bill as if duly stamped. The cost of the stamp may be deducted from the amount paid, or charged against the drawer.

Where a bill is drawn in a set, only one bill of the set need be stamped. Where the amount of the bill is expressed in colonial or foreign currency, the value, for the purpose of stamp duty, is calculated on the value on the day of the date of the instrument, of the money in British currency according to the current rate of exchange.

A bill issued out of the United Kingdom is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

CONFLICT OF LAWS

As the law relating to bills and notes varies in different countries, it is necessary to consider questions which may arise concerning bills drawn in one country and subsequently accepted, paid, endorsed, or otherwise dealt with in another.

A bill must be drawn in accordance with the law of the country of issue (save that it will not be invalid merely because it is not stamped in accordance with that law), accepted, endorsed, &c., in accordance with the law of the country where such acceptance, endorsement, &c., is made.

Further, though not drawn as above required, if it conforms with British law it may, for the purpose of enforcing payment, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom.

In like manner any question as to the meaning or effect of the drawing, acceptance, or endorsement of a bill is determined according to the law of the country where it is drawn, accepted, or endorsed, provided that the effect of a foreign endorsement on an inland bill is, as regards the payer, governed by the law of the United Kingdom.

The duties of the holder with respect to presentment, protest, notice of dishonour, &c., are governed by the law of the country where the bill is presented, protested, or dishonoured as the case may be.

AUTHORITIES.—*Byles*, "Bills of Exchange"; *Chalmers*, "The Bills of Exchange Act".

CHAPTER VIII

SURETYSHIP

The Contract of Suretyship—Liability of the Surety—Rights of the Surety—Joint Guarantors—Discharge of a Surety—Bills of Exchange and Suretyship—Effect of Bankruptcy—Guarantee Insurance—The Scots Law of Suretyship.

Credit in one form or another is at the root of commerce; in the words of Lord Bowen, "the commercial world bases its transactions, not upon the hypothesis of fraud, but upon the hypothesis of honesty". In many cases, however, the credit of a contracting party must be supplemented by that of a third person, who undertakes a collateral liability, that is say, a liability which he is only called upon to fulfil to the extent to which the principal debtor has failed in the performance of what is due from him. This is a guarantee. There is a very clear distinction between a guarantee and an indemnity, and this distinction will be emphasized later.

THE CONTRACT OF SURETYSHIP

Any body with the necessary contractual capacity can enter into the contract of suretyship, and it has become more and more common during the last half-century for insurance companies to undertake this class of work, under the name of Guarantee Insurance. The word debtor, as used above, is of wide import, since the subject-matters of guarantees are various. For the purpose of suretyship a debtor may be considered as anyone from whom a legal obligation of any kind is due. Thus the following are examples of matters within the contract of suretyship: A letter requesting delivery of goods to another, stating that payment will be made; an undertaking, after inspection of an estimate, that payment for work done shall be made; a promise covering advances to be made by a bank. A guarantee may also be given for the fidelity of an appointee to a public office, e.g. county treasurer; or to a private office, e.g. a clerk. A guarantee is of the nature of a contract, and though it may be by deed, that is not necessary unless rendered so for other reasons. Writing, however, is required for the proof of a guarantee when sued on. The Statute of Frauds (1676) enacted that no action should be brought upon certain agreements unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, signed by the party to be charged, or his agent. Among the agreements referred to is a promise to answer for the "debt, default, or miscarriage of another person". The Irish statute of 1695 is to the same effect. Certain points may be noted under two heads: 1. What is a guarantee within the Statute? 2. What evidence will satisfy the Statute?

Guarantees within the Statute of Frauds

(i) Here the distinction between a guarantee and an indemnity is important. The basis of the distinction has long been settled to consist in the different answers to the question: "To whom is credit given?"—a question which will also solve most of the difficulties of agency. If the whole transaction shows that credit is given primarily to the principal debtor, and that the guarantor is only to be called upon in the event of the debtor proving a defaulter, then there is a guarantee of which written evidence is required. On the other

hand, a person may accept responsibility for payment in the first instance, and thus take upon himself a direct primary liability. This is an indemnity; and such a contract verbally made may be enforced. Thus, in the instance above given of a letter requesting delivery of goods to another, and stating that payment will be made, the writer must be liable either as principal or as guarantor, and it is clear that it is a question of interpretation whether what is said amounts to: "If the purchaser does not pay you I will", or "Let him have the goods and I will see you paid"; the former being a guarantee, the latter an indemnity. It is of the essence of a guarantee that the liability of the person supported by it shall continue to be the primary liability.

(ii) The guarantee must be given to a person who can enforce his claim against the principal debtor. Therefore a promise to a debtor to take the debt off his shoulders does not require to be written, because the debtor is not the person who will enforce the debt; and where a partner promises a firm to be liable for the debt of his son to the firm, there is no guarantee, because, though the firm will enforce the debt, the promise is in effect to indemnify the other partners, since a man cannot make a promise to himself.

(iii) Another corollary is that there cannot be a guarantee where the guarantor is already in some way responsible for the debt. Thus a *del credere* agent (see Chapter II of this Part) is by the nature of his agency liable to his principal for choosing an unsound customer, and his liability is not one which must be evidenced in writing. The relation between a broker on the Stock Exchange and his runner is similar.

Of course in all cases the nature of the transaction will be regarded, and merely putting a contract of suretyship into the form of an indemnity will not relieve it from the necessity of writing.

Evidence to Satisfy the Statute

The consideration for the guarantee need not appear upon the document, as the insecurity of guarantees caused by the Courts finding an insufficient statement of consideration led to a statutory provision to the above effect—The Mercantile Law Amendment Act, 1856. It must be remembered, however, that, though a guarantee is good without mention of consideration, if a consideration is in fact inserted which is illegal or ineffectual in law, no evidence can be given of what really was the true consideration, however adequate it may have been, because that would be to vary a written document by verbal statements. It is necessary that the whole of the promise should be in writing, and this is material where after previous negotiations a letter is written by a guarantor finally accepting responsibility. If the previous negotiations have been mere verbal conversations, and are followed by a written statement such as: "You may rely upon me; I take responsibility upon terms agreed", there is no effective guarantee, because the promise has to be filled out and explained by verbal statements, whereas the Statute requires it to be in writing. On the other hand, if the terms agreed are in fact contained in a document or documents such as correspondence, or an unsigned memorandum, or a mortgage deed, a letter in the above words would be good, if there were the slightest references to connect it with the other documents. It is a different matter where the guarantee is given for a definite debt of ascertained amount, or for a liability to be incurred from circumstances known to both parties. In this case all that is required is to identify the debt or circumstances, which will then of themselves explain such a promise as: "I will be responsible for *the* bill", or "I will see that you suffer no loss on *that debt* if you forbear a while"; therefore parol evidence can be given to show to what bill or debt these promises refer.

A written memorandum may be relied upon, no matter for what purpose it was made, and it has been held that a recital of a guarantee in a will was good evidence to satisfy the Statute, as also is a letter repudiating the very liability in question, or one written to a total stranger to the transaction.

The following particulars are essential to a good memorandum of a guarantee: 1. The names of both parties, or some description sufficient to identify them. 2. The undertaking of liability, together with terms as to amount, extent, or duration and subject-matter, or some clear reference to other written documents which do contain them. 3. The signature of the guarantor or his agent. The consideration, if inserted at all, should be set out fully. In many cases it is found that a verbal guarantee is accompanied by various representations as to the state of the principal debtor's credit, or ability to pay, and these may be so reckless, or made with such ample knowledge of their falsity, as to amount to fraud. No action can be brought upon that ground, however, owing to the rule of law already stated, unless the statements are in writing.

In considering what is the effect upon the contract where the parties have failed to satisfy the Statute of Frauds, it is of first importance to bear in mind that all the Statute requires is evidence; that is to say, the Statute affects not the existence of the contract, but only the proof of it when it

becomes the subject of an action. For this reason foreign guarantees must conform to English rules of evidence, and be in writing, since in matters of procedure the Courts are governed by their own law. There are cases where a contract may have effect, though not in writing. Thus if after notice of trial a solicitor undertakes to pay the debt and costs of the plaintiff, and thereupon the plaintiff does not proceed, the High Court would doubtless exercise its summary jurisdiction over the solicitor as an officer of the Court and enforce the undertaking; and where money is paid over under an unenforceable guarantee it is not recoverable, since by setting up the guarantee as a defence to such an action the creditor would not be seeking to enforce it by his own action, as affected by the Statute.

The rule, though illogical, is now well established that the written memorandum must be in existence before the action is brought.

It will have become clear that suretyship is of the nature of contract, and before passing on it may be well to note certain points based on the general law of contract.

Notification that a Guarantee is Accepted

This depends on the nature of the offer. Where the guarantor writes in such terms that he clearly contemplates the creditor acting upon the guarantee, it becomes operative immediately the goods are forwarded, or the advances made, or when any other definite action is taken upon the faith of the guarantee; and no notice need be given to the guarantor. Where, however, the writer merely expresses a willingness to become a guarantor, the case is different; as where a friend writes to a would-be tenant saying he is willing to become responsible for the rent, and the landlord, on seeing the letter, forthwith lets the house without further clinching the matter with the friend; the letter is merely an expression of willingness, with no immediate liability attached to it. The circumstances of each case must be taken into consideration.

Consideration

A forbearance to press a debtor must continue for a reasonable time before the guarantor can be sued, where the parties have themselves not specified a particular period. As to debts already due, it is now established that these can be included in a guarantee, provided the guarantee covers also future advances. By this it is understood that there is either an obligation to give further credit existing when the guarantee is given, or at least that such an obligation is about to be undertaken; or thirdly, that a genuine advance is made within a reasonable time of the guarantee, in which case the guarantee only becomes operative when the advance is made. The mere insertion of a phrase by which further advances are agreed for is of no avail if there is no genuine transaction contemplated or effected under it. In many cases guarantees are carelessly worded so as to seem as though past advances only are covered, e.g. "In consideration of your having advanced . . . &c." In these cases parol evidence is always admissible to show that the wording does not represent the transaction, and that in reality the advances were at the time of the guarantee present advances made on the faith of the guarantee. It may be noted that the consideration for a guarantee varies in its nature, and may be entire, as given for a definite liability on a lease, or continuing, as for supply of goods until the guarantee is withdrawn. In the case of the latter, notice may be given at any time that the guarantee is withdrawn, even though the guarantee be under seal: but in the former type, that is, where once and for all a definite liability has been undertaken, whether it be for a tenant's payment of rent or for a cashier's probity during a term of employment, or for matters of a similar nature, notice of withdrawal is inoperative unless circumstances have arisen such as will give the guarantor an equitable claim to terminate his liability, as where misconduct has come to the knowledge of a creditor who nevertheless continues his relation with the person guaranteed on the same footing as before.

LIABILITY OF THE SURETY

Assuming that a definite contract is established, it remains to be seen what rights and duties arise under it. First, of the liability of a surety. From what has been said it is evident that two important conditions precedent must be fulfilled before the liability can arise. (1) There must be a defaulting principal debtor, and (2) the obligation which he has failed to fulfil must be enforceable at law; a guarantee, for example, given for a secret preference of a creditor by a bankrupt is of no effect. An important limitation of this principle is that where a guarantee is given for the debt of a person under disability the guarantor is liable, although nothing could be recovered against the debtor. Thus, if directors guarantee a debt contracted by a company which is *ultra vires*, they can be sued;

and so the guarantor of an infant's contract for goods which are not necessaries. Perhaps this limitation may be reconciled with the rule by saying that the transaction is rather an indemity than a guarantee, at least where the promise is given as security against the event that the debtor will not be liable at law. The liability arises then on default by the debtor, and it is important to observe that notification is quite unnecessary. No demand for payment need be made either to the debtor or the surety, nor need recourse be had to securities held, before the creditor sues on the guarantee; unless of course the guarantee contains an express stipulation to the contrary, or the consideration is such that mere default cannot give the creditor a cause of action straightway, as where he has undertaken to give time to the debtor on the faith of a guarantee.

The enforcement of a contract of suretyship requires proof as strict as that of any other right. Judgment against the debtor is of no effect against the guarantor, and admissions of the debtor himself that the debt is owing are only operative if made either in the natural course of the very transactions which are the subject of the guarantee, e.g. entries at the time showing receipt of money, or other entries in the course of duty; or made while defending an action for the debt at the request of the guarantor. The evidence of entries, of course, can only arise when that of the debtor himself is not available, either because he has died or absconded. Thus confessions of embezzlement by an employee after being dismissed cannot be given in evidence against the surety.

The surety may be liable up to any amount not exceeding that of the principal debt, and what that amount is will either be specified in the agreement, or, if not, will be ascertained by a construction of its terms. The Courts are careful not to impose upon a surety a greater liability than he has undertaken to fulfil, and therefore the default of an employee who has a guarantor must have occurred strictly in the course of his employment. Interest will only be recoverable if the debtor was himself liable to pay it, and any payments made by the debtor on account must be allowed for in claiming on the guarantee.

RIGHTS OF THE SURETY

We may now consider the rights of a surety upon the contract, and an obvious classification of these is: (1) rights against the debtor himself; (2) rights against the creditor; (3) rights against the co-sureties, if any.

Rights Against the Debtor

Shortly, these consist in the right to compel the debtor to discharge the principal liability so as to free the surety from apprehension of being called upon, and in the right to compel indemnification for loss suffered owing to the debtor's default. Immediately a right of action accrues to the creditor against the surety, a right accrues to the surety to compel the debtor to discharge his obligations. It is not necessary that any payment should have been made by the surety, or even any demand made upon him by the creditor. If a guaranteed debt becomes due on March 1, the debtor can be compelled to pay on that date. If the surety was paid either part or the whole of the debt under his guarantee, he can compel repayment or rank as a creditor against the debtor's estate in the event of death or bankruptcy. If payment is made piecemeal by the surety, repayment may be claimed piecemeal, for the discharge of the whole debt is not necessary before recovering from the debtor the amount paid on his behalf. The surety can claim interest on the amount he has paid. But these rights only arise where payment is made under a legally binding guarantee; no indemnification can be claimed after a voluntary payment of the debt of another. The surety may pay off the debt immediately it becomes due and forthwith sue the debtor, although no demand or threat ever proceeded from the creditor. The right to claim repayment, however, only arises on payment to the creditor, and the giving of a bond or promissory note is not such payment, but mere security which may prove worthless and leave the debtor liable. Where the goods of a surety have been seized in execution or distrained upon, and the surety has either paid a sum for their redemption or suffered them to be sold, this is such payment to support a claim for indemnification to the extent of the sum paid, if any, or of the value of the goods, if sold. In general, the amount recoverable by the surety will be the amount paid, with interest, but if he can prove special damage occasioned by the debtor's default he can recover compensation therefor above and beyond mere repayment; e.g. where a large amount of capital has been withdrawn from a business to meet a guarantee, possibly mere repayment of the amount with interest would not suffice. Where the surety has defended the action compelling him to pay, he can recover costs from the debtor only if the defence

was reasonable. The surety must claim indemnification within six years from the date of the payment in respect of which the claim is made.

Rights Against the Creditor

The surety cannot have a greater liability than the debtor, and therefore can take advantage of the debtor's right to set off a debt due to him from the creditor. This can only arise where both the debt due to the creditor and that due from the creditor are for liquidated amounts, neither being a penalty, and both due at the time of the issue of the writ. Probably the surety can compel the creditor to sue the debtor on undertaking to indemnify him for costs incurred in so doing; and where the creditor holds property of the surety to which he can resort in case of need, the surety can compel him to sue the debtor for the exoneration of such property. The surety can always pay off the creditor and compel a transfer to himself of the creditor's rights against the debtor. The surety and creditor under the guarantee are common creditors of one debtor, and therefore where there are two funds available for the creditor and only one for the surety, the surety can compel the creditor to go against the fund from which the surety is barred, leaving the other for his benefit. The surety is entitled to the preservation, and, on payment of the debt, to the transfer to himself of all securities in the creditor's hands given by the debtor himself or by co-sureties, so that a fair adjustment of loss may be effected. It is immaterial whether or not the existence of these securities was known to the surety at the time of his giving the guarantee, or whether they were given after the guarantee had been effected. If, owing to the creditor's fault, some of the securities are lost, the surety will be discharged from such proportion of his liability as the securities lost bear to the whole securities given; and if the guarantee only covers part of the debt, the surety will only have the benefit of securities given for the whole of the debt to a proportionate extent, subject to any definite provisions to the contrary. The surety may acquire the benefit of an equitable priority vested in the creditor; e.g. where the loan of a first mortgagee is guaranteed and the surety pays off the debt, he can claim priority over a second mortgagee who gets the legal estate, if the second mortgagee had notice of the first mortgage. If a surety guarantees a mortgage debt and subsequently further advances are made without his consent, he can claim a transfer of all securities on payment of the first debt only. It may be noted that all securities are available to a guarantor even though by their nature they are extinguished *ipso facto* on payment by the surety; e.g. where a joint bond is executed by a surety and the debtor, on payment of the debt by the surety he becomes a creditor of the debtor on the bond.

Rights Against the Co-sureties

Where several sureties guarantee a debt jointly, the creditor can claim payment of the whole amount from any one of them on default by the debtor, so that an equitable adjustment is necessary to distribute the loss. This is effected by enforcing the right to contribution. The distribution will be effected rateably according to the extent and proportion of each undertaking; thus, if one surety has to find £10,000 to pay off a debt guaranteed by nine others with him, he can claim £1000 from each, provided that if in any case a surety has limited his guarantee to a smaller amount, his contribution will be limited in proportion and that of the others correspondingly increased. Insolvent guarantors may be disregarded, and those who are solvent may be compelled to bear the debt between them, though for such additional payment they can prove as creditors against the bankrupt estates. Special agreement may confer immunity from contribution, as where a guarantee is only to become enforceable on default by other guarantors. The right to contribution arises immediately on payment of an amount exceeding the proportionate share of the particular guarantor, and the excess need not be paid in answer to a demand or threat by the creditor; but where it is paid voluntarily, the co-sureties from whom contribution is claimed may resist the claim on the ground that payment could not have been enforced by the creditor, and was therefore superfluous. The safer course where a surety wishes to pay the debt and claim contribution is to notify the co-sureties that in default of objection, made by a certain reasonable date, payment will be made and contribution claimed. In an action for contribution the surety should prove the insolvency of the debtor, because if the debtor is solvent the simplest method is to call upon him for indemnification directly, instead of multiplying actions by going against the co-surety, who would then have to bring his action against the debtor.

Miscellaneous Rights of Surety

We have treated of rights arising after payment by a surety, but there are certain other rights enforceable before payment is made. Once a surety has had judgment against him for the

whole debt, he can proceed to the Court to ask for certain orders before he has paid anything at all on the judgment. 1. If he makes all the co-sureties and the creditor parties to his action, he may secure an order from the Court commanding the co-sureties to pay their shares and the creditor to receive them. 2. If the creditor is not a party, when an order may be made declaring that on the surety paying his share the co-sureties shall indemnify him against further payment.

This process may save a guarantor from the inconveniences resulting from withdrawal of a large sum from his business until he can secure contribution from the others to replace it.

JOINT GUARANTORS

Contribution may be claimed from all guarantors though their existence was unknown when the guarantee was given, or though they have only become guarantors subsequently to the party who claims from them. Order of time is immaterial if the contracts themselves contain no definite provision to vary the liability. Possibly contribution may be claimed from one who has guaranteed a surety, and certainly if such an one be called upon to pay the debt, he can stand in the shoes of the surety whom he has guaranteed and claim contribution from the others. The effect of death upon liability to contribution depends upon whether there was joint or several liability. An example of joint liability is where two or more sign a promissory note, the effect of which is that the creditor can sue one, or more, or all, subject to this, that once judgment is obtained, all against whom it is not obtained are discharged. There is joint liability where two or more say simply: "We guarantee the payment of this debt"; and the better opinion is that in such a case the death of one will release his estate from liability, and leave the survivors alone to bear it. Nevertheless the Court is very willing to infer from a consideration of the acts and dealings of the deceased an implied undertaking that his estate shall remain liable. On the other hand, if the debt is for £400, and two sureties undertake a separate responsibility for £200 each, they may be sued in succession for the amount due from them, and death will leave their estates liable. Combining the advantages of both forms of liability is that which is called "joint and several". A creditor should always secure a guarantee in this form, i.e.: "We, the undersigned, jointly and severally guarantee this debt". He can then go against any one surety for the whole amount, and against all in succession upon their distinct undertakings. If we bear in mind that the claim to contribution depends upon the fact that the creditor had a right to have recourse to the estate or party subject to the claim, it becomes clear that no contribution can be claimed against the estate of a deceased joint co-surety, unless there have been such acts on his part as will enable the Court to infer that the deceased intended his estate to be liable. On the other hand, in the usual guarantee where liability is both joint and several, contribution can be claimed against the estate of a deceased guarantor.

The enforcement of the right of contribution is by action, or by proof in bankruptcy if the co-surety has become insolvent. Where a surety is sued for the whole amount of the debt, he may, with leave of a judge, serve notice upon a co-surety so as to compel him to appear and dispute liability in the action if he wishes to avoid admitting both the creditor's claim and the claim of the surety to contribution. In the absence of any contrary agreement, the amount claimed will be such as will cause the loss to fall equally upon all shoulders; but where each has become jointly and severally liable for the debt up to various amounts, the loss will fall rateably in accordance with the proportion of the liabilities undertaken. It must be noted that the right to contribution only arises where one debt is guaranteed by two or more sureties. If a debt is divided up so that each surety becomes alone responsible for what is in effect one of several smaller debts, no right to contribution arises. In all cases it will be a matter of construction to determine to which class a guarantee belongs. Where a surety has received security from the debtor against his being called upon, this must be brought into hotchpot and accounted for before the amount of contribution is fixed, and in so far as the neglect of a surety causes loss of such security, his claim is to that extent reduced. Thus, if a debtor deposits a policy with the creditor, or with a surety, in either case the policy must be kept alive by the party holding it, and if it is transferred to any one surety on payment by him, he must in that case, as well as if it were originally given to him, bring it into hotchpot.

DISCHARGE OF A SURETY

Concealment or Misstatement of Fact

The stringent duty to disclose all material facts which is imposed upon an assured in marine or fire insurance does not apply to guarantees. The general rule affecting disclosure is that such matters as from the nature of the transaction one would expect to be disclosed must be disclosed, that is, there must be general business good faith kept between the parties, but the Courts will not require a painstaking disclosure of what might be reasonably suspected. Thus a bank advanced money to a firm of coffee growers on the security of their produce and on the additional security of a guarantee. The bank did not disclose the fact that the debtor himself had, before the guarantee was secured, estimated a coming deficiency at a high figure. The bank succeeded in an action on the guarantee, since some deficiency is contemplated before a guarantee would be taken, and therefore it was a matter which might reasonably have been suspected by the surety. A bank need not voluntarily disclose the state of a debtor's banking account, even where the debtor has overdrawn at the time of the guarantee. The general inference is that the creditor must disclose any peculiar arrangement which he may have made with the debtor, but as to ordinary matters of business life the surety must put questions if he requires information. On the other hand, an employer taking a guarantee for his servant's good conduct must disclose any previous default made by that servant while in his employment; and even after the guarantee is given, notice of subsequent defalcation must be given to a surety if the employer wishes to continue the employment and still hold the surety liable. Any material change of circumstance must be notified to the surety, as where a guarantee was given for deficiencies in the servant's accounts in order to save him from arrest, and it was subsequently found that there was no power of arrest, the surety was not liable on his guarantee, since he was entitled to notice of circumstances which might reasonably cause him to withdraw. It is obvious that a fair-minded business man in seeking a guarantee will disclose all essential information. Where false statements are made wilfully, or regardless of whether they are true or false, the surety can, in addition to claiming a discharge, require damages for the fraud if he has suffered loss. Where a surety is claiming discharge for misstatement it is immaterial whether the statements were verbal or in writing.

Variation of Terms

An unauthorized variation of terms between the creditor and the debtor may discharge a surety. Thus if a guarantee is given for advances, and subsequently any arrangement is privately made between the creditor and the debtor for payment by acceptances, the surety will be discharged. If the variation is one which could not prejudice the surety he will not be discharged, but it must on the face of it be of such a nature, apart from all considerations as to whether the surety has in fact been prejudiced or not. Where the conduct of a particular employee is guaranteed, it depends on the guarantee given to what extent the employer may change the duties of the servant. Thus a change which involved an increased responsibility or liability to temptation would discharge the surety; and where a variation has taken place, it is always a question of fact how far the guarantee extends, and whether the variation causes substantially a different employment, or an employment not covered by its terms. On similar principles it will be decided whether any particular default is within the employment guaranteed. There is nothing to prevent the employer giving the servant further duties of another kind so as to add a definite class of work to that which is guaranteed, but of course the guarantee will not extend to cover defaults in such additional work. Where several distinct kinds of duties or debts are guaranteed at first, a variation as to one of them will only operate to discharge the surety as to defaults within the service or debt which has been varied. The surety may be debarred from claiming his discharge if he consents to the variation, and such consent may be express or be implied where the creditor is led to believe the consent is given, Giving time or releasing the debtor by a binding agreement will discharge a surety, whether he suffers damage or not, e.g. an agreement to take payment by instalments. A creditor may, however, release a debtor from fear of being sued by him while at the same time reserving his right against the surety, so that the debtor will only be liable on a claim by the surety for indemnification after the surety has paid the creditor. Such reservation need not be in writing unless the whole arrangement whereby the debtor is released is reduced to writing. A composition under the Bankruptcy Acts in which the creditor participates will not release the surety, because the debtor is not released by the act of the creditor, but by operation of law.

BILLS OF EXCHANGE AND SURETYSHIP

A word may be said with regard to bills of exchange in so far as these give rise to questions of suretyship. The *prima facie* orders of liability of parties to a bill or note are fixed (see Chapter VII of this Part). Thus the acceptor is the principal debtor on a bill, and the drawer and all endorsers are his guarantors to the holder. The drawer and endorsers, however, have the capacity of principal debtor also, the drawer being principal as regards the endorsers and each endorser as regards subsequent endorsers. Thus, if a holder gives time to the acceptor by an agreement with him which is binding in law, all other parties are discharged from liability on the bill; if time is given to the drawer, all endorsers are discharged; if to an endorser, all endorsers subsequent to him are discharged, but not those prior to him. It has been held that the renewal of a bill is equivalent to giving time to a debtor, and consequently all parties in the position of sureties are discharged. Merely taking a new bill is no discharge of itself, but only where it is consideration for some other favour sufficient to operate as a discharge. Evidence is admissible to rebut the *prima facie* degrees of liability between parties to a bill. Thus, in the case of accommodation bills the acceptor is substantially the surety and the drawer the debtor. If, therefore, a holder, knowing the origin of the bill, gives time or comes to an arrangement with the drawer, the acceptor will be discharged. Where the debtor does not himself draw the bill, but has his debt secured by a bill drawn and accepted by outside parties, the ordinary degrees of liability are not affected, and the drawer need not contribute equally with the acceptor, but can throw the whole amount upon his shoulders. This, however, will not be the case where the bill is drawn and accepted in performance of a preceding arrangement between the parties to the bill. Thus, where three directors endorsed a promissory note given by a company, it was held that if the successive endorsements were given in performance of an understanding among the directors that they were to be co-sureties with equal liability, then proof of that fact was admissible to vary the ordinary successive claims to indemnity which would have put the loss upon the first endorser alone. The whole distinction is between cases where the bill is created by parties who have already a mutual understanding that they are co-sureties, and cases where the parties have no understanding. Of course the liabilities according to law merchant would attach as regards strangers who had become holders of the bill; but where a holder has become aware that the parties to his bill have peculiar relations between each other, he should not disregard this information. An example of this is given above. And where there are joint parties to a note, and a holder becomes aware that one is a mere surety for the other, he must not give time to the chief debtor or the surety will be released. It may be noted that where there is an exchange of acceptances, and one acceptor has had to pay, his remedy is not against his drawer, as in the case of a single accommodation bill in the drawer's capacity as principal debtor, but against him on the other bill, and as acceptor of the other bill.

EFFECT OF BANKRUPTCY

A surety taking security from a debtor may be defeated by the law as to fraudulent conveyance in bankruptcy and preferences (see Chapter XI of this Part). Where the debtor has become bankrupt the course to be followed by his surety will vary according as to whether the creditor has himself proved or not. If before the bankruptcy the surety has made any payment to the creditor they each become separate creditors, the one for indemnification as to the amount paid, the other for the balance of the debt. Where, however, the creditor has proved for the whole debt, he will be entitled to dividends from the debtor's estate, and the surety will be called upon for the balance to the extent of the guarantee. His right to indemnification is gone, however, because the law will not allow of double proof in bankruptcy. The creditor has proved for the debt, and no other proof is allowed for the same debt, though for the purpose of discharging the debtor the law comforts the surety with a theoretical right of proof which prevents the surety from suing the debtor after his discharge. If the surety pays off the creditor the whole amount, or so that the creditor takes the payment in full satisfaction of the debt, he can then take over the benefit of the creditor's proof, though of course dividends already paid to the creditor will be accounted against him. A third case is where, without paying off the creditor altogether, the surety pays part of the debt he is liable for. In this case he must wait till the creditor has received twenty

shillings in the pound from all sources, and then he will have the benefit of the creditor's proof to receive dividends for his indemnification. If the creditor has not proved, the case is simple, for by payment of the whole or part of the debt he can to that extent prove as a creditor of the debtor. If a co-surety has become bankrupt, then a surety has a right of proof in the bankruptcy when he has paid more than his share and has become entitled to claim contribution; but here again his position is modified according as the creditor has proved or not. Where the creditor has proved, the surety has the benefit of the proof as soon as the creditor has received twenty shillings in the pound, provided, of course, the surety has paid more than his share in effecting the payment. Where the creditor has not proved, the surety has his independent right to prove when he has paid the creditor more than his share. The practical difference is this, that where the creditor has proved, and the surety takes over the benefit of the proof, he is entitled to dividends based on the whole amount of the debt and the proportion it bears to the bankrupt's liabilities, because the creditor's proof which is taken over was for that full amount. The only limit to the dividends is that the surety cannot receive more than the full amount of contribution due to him. On the other hand, where the surety proves independently, dividends paid to him will proceed only on the basis of the amount of contribution due to him, which is, of course, a much smaller basis. Manifestly, then, it is better for a surety to be able to take over the benefit of a creditor's proof for the full debt, and where the creditor has not proved for the debt the surety has a statutory right on giving proper indemnity to the creditor to use the name of the creditor to prove for the full debt, in this way securing a fuller reimbursement.

Where a creditor is proving against a debtor's or a surety's estate he must deduct all payments or dividends received from sureties or the debtor, and in cases of a debtor's bankruptcy, securities held upon the debtor's property are within the valuation rules of bankruptcy. If the surety as well as the debtor is bankrupt, the creditor can prove for the whole amount of the debt against the estates of both the debtor and the surety and receive dividends until he has obtained his debt in full.

GUARANTEE INSURANCE

A simple form of fidelity guarantee by a private person has been given in Part I, Chapter IV. Of recent years a large proportion of guarantee work has been taken over by insurance companies, and this is so far recognized that it is the practice of the Courts to accept such guarantees for receivers appointed by them. Similarly for officers appointed by Local Government authorities, such guarantees are used, and in many cases private employers require them. We give here a specimen form (reproduced by permission of the Royal Exchange Assurance Corporation) which will serve for directing attention to such points as need to be noted. In the first place the contract must be signed and in writing to satisfy the Statute of Frauds. There are three parties to it, as essential to a guarantee, thus distinguishing insurance of this kind from that effected to provide against Workmen's Compensation claims; and the employer is the party assured. The proposal form for this policy requires particulars as to name, address, of the employment about to be undertaken, and also of previous employments during the past ten years, with reasons for leaving. Of course these particulars go to the root of the policy and must be answered with truth. On the other hand, the general rule of insurance which requires disclosure of everything relevant to the contract does not apply to guarantee insurance, which is governed by the ordinary suretyship rules. Any statements made to the insurers relating to methods of conducting the business, or any matters which are important in estimating the risk, must remain true representations of fact throughout the existence of the policy, and therefore change of circumstance should at once be notified to the insurer. Particulars are usually required to be given as in Form A on p. 42. A specimen policy is shown in Form B on pp. 43 44.

It will be noted that the company and the employee enter into a joint and several covenant for the due discharge of the obligations, so that the employee is debtor and the company surety, for the purpose of applying the general principles of suretyship. Whether any particular default is within the wording of the policy is always a matter of construction. The ordinary rules of suretyship apply to any variation in the employment guaranteed. In some policies provision is made for the endorsement upon the policy of the consent of the insurer to variations in employment or in any other matter where any alteration not consented to would operate to discharge the guarantor, such as in a system of bookkeeping or inspection upon the faith of which the policy had been made. What has been said as to notifying the surety of

Form A

PROPOSAL FOR GUARANTEE OF FIDELITY

1. Full Christian Name and Surname	Age.....years.
2. (*a*) Present address ... ... (*b*) How long have you resided thereat? ... ... (If under 3 years, give previous addresses stating when you resided at each)	
3. Amount of security required	
4. Nature of the employment for which the Guarantee is required	
5. Full **name** and **address** and **business** of the Employer for whom the Guarantee is required	
6. (*a*) Amount of salary to be received . . . .. (*b*) Amount of commission or other remuneration .. (*c*) Amount of travelling or other expenses	
7. (*a*) Have you ever before made a proposal to this Corporation for a Fidelity Guarantee? ... ... (*b*) Have you ever made a proposal to any other Guarantee Society? . . . . (*c*) If so, when, and with what result?	

8. State how you have been employed for the last 10 years:—

From (Month and Year)	To (Month and Year)	Names and Full Present Addresses of Employers.	Nature of Employment	Reason for Leaving

9. Names, addresses, and occupation of two persons who are Householders, who have known you for some time, and to whom the Corporation may refer if necessary . . . (**Not previous employers or relatives.**)	1. 2.

I hereby declare that I have in the replies above given stated the whole truth without any reservation whatever.

Signature ....

Witness ....

Date .....

Agency .....

Form B

Form of Fidelity Guarantee.

(For a Simple Form see Part I, Chapter IV.)

A.D. 1720. A.D. 1720.

ROYAL EXCHANGE ASSURANCE CORPORATION

CHIEF OFFICE:—ROYAL EXCHANGE, LONDON, E.C.

Policy No. .... Amount Guaranteed £

Premium £ : : Renewal Date. . . . .

Fidelity Guarantee Policy.

This Agreement made the .... day of ... .. in the year of our Lord .....
BETWEEN . . . . (hereinafter called the Officer), of the first part, and THE ROYAL EXCHANGE ASSURANCE CORPORATION (hereinafter called the Corporation) of the second part, and the .... of . . . in the . ... (hereinafter called the Assured), of the third part.

Whereas the Officer has in conformity with the provisions of the "Local Government Act, 1894," been appointed to the office of . . .. of the . .. . . . , and having been required to find security for the due and faithful discharge of his duties while he shall be employed in the said office, the Corporation, at the request of the Officer and in consideration of the annual sum or Premium of . .. . to be paid to the Corporation, has consented to give such security upon the terms and subject to the provisoes or conditions hereinafter contained. And the Officer and the Corporation have agreed to enter into the Covenants hereinafter contained.

Now therefore this Agreement doth Witness, That the Officer on his own behalf, and for himself, his Heirs, Executors and Administrators, and the Corporation as Surety for the Officer, for themselves and their successors, do hereby respectively, jointly and severally covenant with the Assured and their successors, that the Officer shall and will from time to time and at all times hereafter whilst he continues in the said Office, duly and faithfully discharge all and every the duties of the said Office to which he has been appointed as aforesaid: and in all things and at all times faithfully and duly obey the orders and regulations applicable to his said office, and prescribed by lawful authority in that behalf; and in particular shall and will faithfully, honestly, and punctually account to the Assured or to the Auditor or other the proper Officer in that behalf, for all and every sum or sums of money bank notes, drafts, or securities for money, goods, chattels, or other property which he, the Officer, whilst acting in his said Office, or any Assistant or other person acting under his authority, or on his behalf and with his consent, shall from time to time receive, or which he the Officer or any such Assistant, or other person as aforesaid, from time to time whilst in his said office, should or might and according to the duties of his said office ought to have received; and that on his removal from his said office, or on his death, he, the Officer, his Executors or Administrators shall and will forthwith deliver over to his successor, or to the proper Officer in that behalf, or to any person to be duly authorized by the Assured to receive the same, all books, papers, vouchers, writings, monies, bank notes, drafts, bills of exchange, promissory notes and other securities for money, goods, chattels, and other property which shall, at the time of such removal or death, be in the hands or custody of the Officer, or of any such Assistant or other person as aforesaid.

And it is hereby further covenanted, declared and agreed by and between all the said parties that a Certificate under the hand of the Auditor, who shall under the said Act have authority to audit the accounts of the Assured, made at or after a legally constituted audit of the accounts of the Officer stating the amount of any loss occasioned by the acts or default of any payment or duty of the Officer while in his said office, or of any such assistant or other person as aforesaid, shall be sufficient and conclusive evidence against the Officer, his Heirs, Executors and Administrators, and against the said Corporation, and also as between the Corporation and the Officer of the truth of the contents of the said Certificate, and that this Agreement has become forfeited thereby to the amount of the loss stated in such Certificate, and shall form a valid and binding charge and claim not only against the Officer, his Heirs, Executors, and Administrators, but also against the said Corporation, without it being necessary for the Assured or their successors first to take legal or other proceedings against the Officer, his Heirs, Executors, or Administrators for the recovery thereof, and without further or other proof being given, either by or on the part of the Assured or their successors, in any action, suit, or proceeding to enforce this Agreement against the Corporation or against the

Officer, his Heirs, Executors, or Administrators, or by or on the part of the Corporation in any action, suit or proceeding against the Officer, his Heirs, Executors, or Administrators of the amount of such damage or loss, or that the same have been sustained, incurred, or occasioned by and through the acts or act or default of the Officer, or of any such Assistant or other person as aforesaid while in office. And the Officer doth hereby, for himself, his Heirs, Executors, and Administrators, covenant and agree with the Corporation and their successors that he, the Officer, his Heirs, Executors, and Administrators, shall and will from time to time and at all times, save, defend and keep harmless the Corporation and their successors, and the Capital-Stock, Estates, and Securities of the Corporation and all and every individual member thereof, from and against all loss and damage, cost and expenses which the Corporation or the Capital-Stock, Estates, and Securities thereof, shall or may or otherwise might at any time sustain or be put unto for or by reason or in consequence of the Corporation having entered into this Agreement to guarantee for and at the request of the Officer.

Provided always, and it is hereby agreed and declared between and by the said parties, and this Agreement to Guarantee is made on this condition, that the Corporation shall not, or the Capital-Stock, Estates, and Securities of the Corporation be liable by virtue or in consequence of this Agreement to pay or make good to the Assured or their successors, or to any other person in any way, to any greater amount than the sum of .....

Provided also, and it is hereby further declared and agreed between and by the said parties, and this Agreement to Guarantee is made and entered into on this further express condition, that if default shall be made in payment to the Corporation of the further annual sum or Premium of ..... on the ..... day of ..... in the year of our Lord ..... or on the ..... day of ..... in any succeeding year, and if the Corporation shall give notice in writing of such default to the Assured or their successors, or if the Corporation shall at any time give three calendar months' notice in writing to the Assured, or their successors, of their intention to put an end to this Agreement to Guarantee at the close of the then current year of Guarantee, then, and in either of such cases, this Agreement to Guarantee, and all liability on the part of the Corporation and of the Capital-Stock, Estates, and Securities of the Corporation shall, from and after the expiration of one calendar month from the time of giving such notice in the first-mentioned case, cease and determine unless the Assured or their successors shall in the meanwhile cause the said Annual Premium to be paid to the Corporation and shall, from and after the expiration of such current year in the last-mentioned case, cease and determine; and neither the Corporation nor the Capital-Stock, Estates, and Securities of the Corporation shall be liable to make good or indemnify or save harmless the Assured or their successors from or against any loss or damage, cost and expenses which the Assured or their successors shall or may sustain or incur, or which may be occasioned by or through any act or default of the Officer, his Heirs, Executors, or Administrators, or any such Assistant or other person as aforesaid subsequently to one calendar month from the time of the giving such notice in the first-mentioned case, unless this Agreement to Guarantee shall be kept on foot by the Assured aforesaid subsequently to the close of such current year in the said last-mentioned case. **Provided always**, that notwithstanding the determination of this Agreement to Guarantee in either of the cases aforesaid, it shall be deemed and taken to be an existing Agreement to Guarantee in respect of all liabilities which the Corporation shall or may have incurred thereon prior to such determination.

In Witness whereof the said party of the first part, and the Secretary of the said Royal Exchange Assurance Corporation, for and on behalf of such Corporation, have hereunto set their hands the day and year first above written.

Signed by the said .....

in the presence of .....

Signed for and on behalf of the ROYAL EXCHANGE ASSURANCE CORPORATION,

By Order of the Court of Directors,

Examined .....

Entered .....

Secretary.

(Reproduced by permission.)

defaults committed by the employee applies to guarantee insurance, and policies frequently specify the time within which notification must be made. Such notification is then a condition precedent to recovering from the surety. Where the person guaranteed has no power of dismissal, as, for instance, if a Board of Guardians are guaranteed for a collector and the power of dismissal is in the hands of the Local Government Board, the policy is not avoided by not complying with a demand by the insurer to have the employee dismissed. The insurer, however, could revoke the policy unless there was an agreement to the contrary express or implied from its nature. Provisions regulating the existence of liability vary in different policies, and it is sometimes a matter of difficulty, to be decided by the facts of each case, whether certain acts contracted for must be done before any payment can be claimed, or whether the obligation to pay is independent of them. Stipulations relating to matters to be done after payment of the sum due on the policy cannot be conditions precedent to payment even though there is a general clause making all stipulations, conditions precedent. Thus, where there is a provision that the assured shall give all assistance to enable the company to obtain reimbursement, this cannot be used by the company to delay payment, because they must be under an obligation to pay before any claim to reimbursement can be founded. On the other hand, it is frequently stipulated that in the case of embezzlement, for instance, a prosecution shall be instituted before payment as a means of testing the validity of the claim. In the policy here used it will be seen that the auditor's certificate is made conclusive, but each policy should be examin for its own provisions. The amount of the pol corresponds to the limitation of liability o limited guarantee. If the premium is kept up the employee, the employer will require product of receipts for payment. Each policy must examined to see what provision is made for termination of liability upon non-payment of p mium, but it will be noticed that the form refer to requires notice to the employer that the p mium is due, in order to give him the opportun to save the policy by payment. A renewed c tract will not itself contain provisions for renewal, unless expressly inserted. As guarantors the company are entitled to all the usual securities and remedies against the debtor.

Finally, attention may be called to the fact that a partner has no authority to bind his firm by giving a guarantee in the firm name, unless there is an agreement express or implied that he may do so. Where a guarantee is to be given to or for a firm, it is revoked by any change in the membership of that firm. (See Chapter III of this Part.)

Form of Guarantee for Goods Supplied

I hereby agree to be accountable to you to the extent of £250, the price of goods supplied to my son, Mr. Henry Thomas Wadsworth, the goods to be delivered at his residence at Wimbledon during the month of May next; and the account to be payable within the three following months. This guarantee is not a continuing guarantee.

(Sd.) WILLIAM WADSWORTH.

To the Wholesale and Retail
Furnishing Company, Ltd.

(*Another Form*)

To the Wholesale and Retail Furnishing Company, Ltd.

We, the undersigned, agree with you as follows:—

1. To guarantee the payment to you by the Committee of the Commercial and General Club for all goods supplied by you to the order of the Committee, but subject to the limits in the aggregate and in particular hereinafter stated.

2. This guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not under any circumstances exceed £1000, and the proportionate shares of liability of each of us individually shall not exceed the amount set against our respective names at the foot hereof (subject only to the bankruptcy or insolvency of any of us [see p. 40]). If in the aggregate the liability shall be less than £1000, our respective liabilities shall be reduced in proportion thereto.

3. You shall be at liberty to grant time or make any other reasonable concession for payment to the Committee without discharging us from our liability.

4. This guarantee shall be revocable as to future transactions by one month's notice given to you in writing under our joint signatures, or the joint signatures of the survivors of us and of the personal representatives or any of us deceased.

Dated the

Signatures.	Amount guaranteed
CHARLES JAMES FOXE.	£200.
RICHARD B. JOHNSON.	£200.
EDWARD O. BUMPUS.	£300.
RALPH C. WORTH.	£300.

THE SCOTS LAW OF SURETYSHIP

In Scotland the obligation by which one person becomes engaged as a surety for another, either for the performance of a deed or the payment of money, is known as cautionry,[1] the person who becomes the surety being known as the cautioner, and the person on whose behalf the obligation is undertaken as the principal debtor. The caution is the amount of money for which the cautioner becomes bound in the event of the principal debtor failing to pay the sum or perform the deed in respect of which the obligation is entered into. Cautionry is therefore synonymous with guarantee, the latter word being used to signify a particular branch of the general obligation imported by the former word. A mercantile guarantee, in the stricter sense, is a cautionary obligation having reference to a future transaction or course of dealing, coupled, if such be clearly its import, with liability for past transactions as well. But in regard to those documents which have for their object the inducing of the person to whom they are addressed to give credit to a third party, care must be taken to distinguish between mere letters of introduction, which guarantee nothing; letters of recommendation, which may be tantamount to guarantees; and letters of credit and circular letters, which bind the writer to the addressee and the holder, if the former cash the drafts of the latter.

Nature and Essentials of Cautionary Obligations

The obligation or engagement of a cautioner is a collateral one, to the effect that in the event of the failure of the principal, on whose behalf the engagement is undertaken, to pay the debt or perform the act for which he is or may become liable, the cautioner will do so. Such obligations were formerly gratuitous, but as the Legislature has expressly sanctioned the taking of bonds of guarantee associations, and the Courts have sanctioned the use of such bonds in cases where appointments of officers of their own fall to be made, it is unlikely that a cautioner would now be held to be unable legally to stipulate for a reward as a condition of his undertaking the obligation. It is of the essence of a cautionary obligation that there should be someone, independently of the cautioner, primarily bound for the payment of the debt or performance of the obligation; and while in cautionary obligations undertaken for a married woman, and for a minor without the consent of his curators, the primary obligation is not enforceable against the principal obligant, the obligation is nevertheless enforceable against the cautioner, the reason for this apparent exception being that the cautioner is presumed to know the condition of the debtor on whose behalf he interposes, and his engagement being tantamount to his saying: "If the debtor takes the benefit of the law on his behalf, I shall make good his default". The cautioner is entitled to plead any defence in bar or reduction of payment which is competent to the principal debtor, and although on the face of his obligation he may be bound for a larger sum, he cannot be compelled to pay more than is due by the principal obligant. Where the principal obligation comes to an end, the liability of the cautioner ceases to exist. Again, by his signing a blank sheet of paper and entrusting the debtor to fill it up with an obligation the terms of which have previously been adjusted between the parties, the cautioner cannot be subjected to a liability greater than that he had previously agreed to. Thus, to take a case in illustration, where a father, having agreed to guarantee his son for £500, had handed to him by his son a blank sheet of paper, with a request that he should sign his name across a sixpenny stamp attached to the paper, and the father did so, he was held not liable in respect of an obligation to pay certain premiums of insurance on the son's life which the son, unknown to his father, had added to the original obligation of guarantee.

Constitution of the Obligation

The Mercantile Law Amendment (Scotland) Act of 1856 provided, in terms substantially the same as those of Lord Tenterden's Act, which applies to England and Ireland, that all guarantees, securities, and cautionary obligations, and all representations and assurances as to character, conduct, credit, ability, trade, or dealings of any person, made to the effect or for the purpose of enabling anyone to obtain credit, money, goods, or the postponement or payment of any debt or of any other obligation demandable of him, must be in writing subscribed by the grantor or his agent. Every cautionary obligation must therefore be in writing, and, with the exception of those granted *in re mercatoria*, i.e. in ordinary business transactions between business men, or those which, although improbative, have been homologated or rendered legally valid and effectual by having been acted

[1] The words "caution", "cautioner", and "cautionry" are pronounced as though written "kay'shon", "kay'shoner", and "kay'shonry".

upon with the consent, express or implied, of the grantor, must be holograph of the grantor or executed according to the usual formalities required by law. Cautionary obligations are very strictly construed, and nothing will be inferred which the terms of the obligation do not expressly warrant. An offer of guarantee in writing importing an understanding that a guarantee will be given when required, or which is contingent on the acceptance of an offer which is duly accepted on the strength of the offered guarantee, is quite a good, though not a direct, cautionary obligation. A signature appended on the express or implied condition that certain other signatures shall be obtained is not binding if the condition is not fulfilled, even although the creditor, whose duty it is to see that the remaining signatures are duly appended to the document, has relied on the validity of the caution. Representations made or plainly implied by the creditor must be true in point of fact, and, as will be seen later, where the guarantee is for conduct, a further obligation is imposed on him.

Kinds of Obligation

Cautionary obligations are of two kinds, proper and improper, the former being those where the cautioner is bound simply as cautioner for the principal debtor, the latter being those where the cautioner and the principal debtor are bound jointly as principals. In the latter kind, of which a bond of credit to a bank is an example, the rights of the cautioner as such are renounced *quoad* the creditor, but reserved *quoad* the principal debtor. Formerly the cautioner in a proper cautionary obligation had the benefit of what was known as "discussion", under which the creditor was obliged to "discuss" the proper debtor before calling on the cautioner to implement his obligation; but the Mercantile Law Amendment Act of 1856 brought the Scots law into conformity with that of England by abolishing this benefit of "discussion" in all cases where it is not expressly stipulated for. Obligations for the performance of an act, or for the faithful discharge of an office, by another necessitate, in any event, that the failure of the principal debtor must be established before the cautioner can be called upon to make up the loss of the party suffering by the default, and therefore the provisions of the statute do not apply.

Liabilities of Cautioners

An obligation by several cautioners does not import a joint and several liability on their part unless such a liability be clearly expressed. Where they are bound jointly and severally, the creditor is entitled to call upon any of the sureties for payment of the full amount due, but the person so paying is, as against his co-obligants, entitled to recover only a rateable proportion of the amount actually paid. In the event of one of the co-sureties becoming bankrupt, the solvent obligants are liable for his share or deficiency. Where the principal debtor is unable to pay and one of the co-cautioners becomes bankrupt, the creditor is entitled to rank upon, and recover a dividend from, the bankrupt's estate on *the full amount* of his claim; whereas, if the creditor call on a solvent surety to pay, such surety, if he does pay, is entitled to rank upon the estate of the bankrupt *only for his share* of the amount paid under the obligation. Again, where the creditor ranks upon the estate of an insolvent surety for the full amount of his debt, so long as the dividend received from him does not exceed the share which, in ordinary course, would fall to be paid by the bankrupt surety, the co-sureties cannot be called upon by the trustee to pay any part of the dividend received by the creditor on his claim as lodged.

The Position of Firms as Cautioners

A partner of a firm cannot bind his firm by signing the firm's name to a cautionary obligation, such as that contained in a Bond of Caution, Bond of Credit or Guarantee, unless it can be shown that the granting of such obligations is necessary and incidental to the conduct of the firm's business, or provided for in the contract of co-partnery. To render a firm or company liable for obligations outwith the scope of the partnership business, not only must the firm's name be adhibited to the contract by one of the partners, but the signature of each individual partner constituting the firm or company must be added. In obligations where a firm and its individual partners are taken bound, it is usual to add a personal obligation by the partners as individuals over and above their obligation as partners, since the dissolution of the firm terminates its existence, and therefore its liability for any future obligation.

Cautioner's Right of Relief

An important right which cautioners possess is that of total relief against the principal debtor for the sums paid under their obligations. This right emerges either on actual payment of the debt by the cautioners, or on their being distressed for it by the creditor. Even before this, if the principal debtor be *vergens ad inopiam* (i.e. appears to be on the verge of bankruptcy), the Court will, on equitable grounds, sustain an action for relief by the

cautioner. They have also, unless there happens to be a specific agreement to the contrary, a right at any time to insist upon being relieved of their obligation. If a cautioner pays the debt in full, *but not otherwise*, he is entitled to demand an assignation of the creditor's claim and of any securities held against it, to the effect of enabling him to take proceedings against the principal debtor as though he were the original creditor. Payment of only part of the debt does not therefore confer this right, so that in the case of a surety who has become bankrupt, payment of a dividend on the whole debt confers no right to an assignation of the debt on the part of the trustee in his sequestration. Cautioners have also a right of relief *inter se* on the principle that those who are bound for the same debtor and for the same debt, even although bound by different instruments and for different amounts, have a common interest and a common burden; so that, if one cautioner who is directly liable to the creditor pays such creditor, he is entitled to claim contribution from his co-cautioners whose obligation to the common creditor he has discharged. While, therefore, in a question among themselves cautioners can always insist on mutual rateable relief, they are each bound, nevertheless, to communicate to the others the benefit of any ease or deduction, as well as of any security over the estate of the principal debtor. This right of relief among cautioners *inter se* does not arise until one of them has paid more than his share. Where one has paid up the whole debt, he is entitled to an assignation of the creditor's claim, to enable him to operate his right of relief against his co-cautioners. The right of relief of cautioners *inter se* cannot be impaired or discharged by the creditor without discharging the co-cautioners.

Guarantees for Performance of Office

In such guarantees it is imperative that at the time of receiving the guarantee the creditor should have made a full and fair disclosure of all the circumstances which would be likely to affect the guarantor in deciding whether or not he should enter into the obligation. In the second place, it is essential that in the course of the employment of the guaranteed person the creditor should do no act to the prejudice of the guarantor, such as continuing to employ the person in the knowledge of his dishonesty, or materially altering his responsibilities without notifying the guarantor. Mere slackness of supervision and delay in taking accounts are not, however, among the contingencies against which such guarantees are meant to provide. The risks involved in the duty of a bank agent are unusually great, and in consequence somewhat greater vigilance is expected from his superiors than in the ordinary case.

Extinction of Cautionary Obligations

Besides those modes in which a cautionary obligation may come to an end, which have been adverted to, there are several others. In the first place, cautionary obligations are subject to a septennial limitation, introduced by the Act 1696, c. 5, the effect of which is of a sweeping description. The limitation does not merely presume payment or satisfaction of the obligation at the end of seven years from the date of its inception. After the lapse of the septennial period the cautioner is absolutely freed of his obligation, so much so, that after the expiry of the period a cautioner who pays money in terms of his obligation is entitled to get it back. Similarly, the payment of interest after the seven years does not have the effect of perpetuating or renewing the obligation. Certain kinds of obligations are not, however, affected by the statute, such as those in marriage contracts, for payment of an annuity, or those for the discharge of an office. Nor does the statute apply to bills of exchange in which one person signs as cautioner for another. The cautioner may also be freed directly, as by direct discharge, the principal debtor still remaining bound, or indirectly and consequentially as by satisfaction, payment, or extinction of the principal obligation; by any essential alteration in the respective positions of the creditor and the principal debtor, unassented to by the cautioner; by the discharge of the debtor without the cautioner's consent; by the discharge of a co-cautioner without the assent of the remaining cautioner or cautioners; by the creditor expressly granting the principal debtor time in which to pay or perform his obligation, which, in its effect, is analogous to the relief of a cautioner by a change in the character of the obligation, unassented to by the cautioner; by the creditor's extreme neglect to take legal proceedings to enforce his claim; or, finally, by the creditor's relinquishing any security over the debtor's estate without the cautioner's consent. It must not, however, be forgotten that to the general rule, that a discharge of the principal debtor frees the cautioner, there is an exception in the case of sequestration, since no act of the creditor in voting and drawing a dividend, or in assenting to the discharge of the bankrupt, or to a composition, discharges a co-obligant of the debtor. But the obligant may obtain from the creditor an assignation of the debt on payment of the amount thereof and in virtue of his assignation claim on, and draw dividends from the bankrupt estate if otherwise entitled to do so. The neglect on the part

of the creditor to take legal proceedings to enforce his claim must be of an extreme kind in order to free the cautioner, and no mere delay to institute such proceedings, or inactivity, short of a degree of negligence such as to imply connivance or fraud, is in itself sufficient to free the cautioner. Again, with regard to granting the debtor time in which to pay, mere forbearance on the part of the creditor to enforce payment from the principal debtor, or even a mere agreement not to sue him (provided, of course, the cautioner's ultimate right of recourse against him is not imperilled), will not have the effect of liberating the cautioner. If, however, the creditor so tie up his hands as to prevent him from enforcing his obligation at any time, should he wish to do so, the cautioner will be discharged. Thus the taking of bills from the principal debtor will, as a rule, be held as the equivalent of giving time. If, however, it can be shown that the taking of a bill is usual in the particular trade in which the principal debtor is engaged, and to which the cautioner's obligation extends, he will still be bound. Where two or more persons primarily indebted as principals subsequently agree that, as between themselves, one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies, though the rule may be modified by circumstances.

[AUTHORITIES.—*Dr. Colyar*, "Law of Guarantees".
(*Scotch*). *Gloag & Irvine*, "Law of Rights in Security"; *Green's* "Encyclopædia of Scots Law"; *Wallace & M'Neil*, "Banking Law".]

CHAPTER IX

LANDLORD AND TENANT

Introductory—The Various Kinds of Tenancies—Creation of Tenancy—The Liabilities of Landlord and Tenant—Fixtures—Assignment and Sub-letting—Bankruptcy of Lessee—Distress—Liability of Landlord and Tenant to Third Parties—Sporting Rights—Determination of Tenancies—Agricultural Tenancies in England and Wales—Landlord and Tenant in Scotland—Landlord and Tenant in Ireland.

INTRODUCTORY

The law of landlord and tenant is perhaps one of the most important in connection with business life, as few businesses are capable of being carried on without entering into a contract involving tenancy. The law is essentially different in Scotland and Ireland from what it is in England and Wales, and separate treatment is therefore necessary. We deal first with the English law. While the rules of law are here stated, the rules of business must, of course, be borne in mind, and even though writing may not be required by law, no wise man will leave any point as to his tenancy in doubt for the want of a full and accurate written agreement.

In order to create the relationship of landlord and tenant there must be an allowance by the landlord for the tenant to occupy house or land in consideration of paying something by way of rent to the landlord.

Lease and License

A lease may be defined as "a letting of lands or tenements by one person, called the lessor, to another person, called the lessee, for a term of years for a rent reserved". But, strictly speaking, any contract of tenancy is a lease, whether it be a weekly tenancy or a tenancy for a term of years. In its popularly accepted sense the word "lease" is used to describe tenancies of a greater period than three years in duration.

It is important to distinguish a "lease" from a "license", which does not create tenancy. Cases frequently occur when there is very little to distinguish one from the other, and yet the law concerning the rights of the parties in each case is very different. The holder of the lease must have exclusive legal possession, while a licensee has no such right. A lodge keeper, whose duty it is to take charge of the entrance to a house, and who occupies the lodge for the purposes of these duties, is only a licensee, and, having no legal possession, can be turned out at any time without notice.

THE VARIOUS KINDS OF TENANCIES

Tenancies may be divided under four heads, namely:

1. Tenancies at will.
2. Tenancies at sufferance.
3. Tenancies from year to year, or for shorter periods.
4. Tenancies for terms of years.

Tenancies for one or more lives were at one time common, but may now be disregarded.

Tenancies at Will and Sufferance

In a *tenancy at will* the tenant, instead of holding for any particular period, holds at the will

of his landlord and is liable to be ejected at any moment. The tenant is also at liberty to quit whenever he likes. Such a tenancy is frequently created by a tenant "holding over" by consent at the end of his tenancy, when a tenancy at will is implied. The law, however, will be eager to turn it into a regular tenancy when there is the slightest indication of intention, as by the receipt of periodical rent.

A *tenancy at sufferance* arises where one who has held a tenancy continues in possession without any agreement or disagreement on the part of the person entitled. Such a tenancy is determinable at any time without notice.

Tenancies from Year to Year

A yearly tenancy continues from year to year, and can be determined by either the landlord or the tenant, on the first or any subsequent anniversary of the commencement of the tenancy, by the service of a notice to quit. The notice must be for not less than half a year in duration, and must expire with the end of the year. It is not absolutely necessary that the terms of the letting should be in writing. Tenancies of this description are frequently entered into without any communication passing between the landlord and the tenant beyond a statement as to the amount of the rent per annum and an agreement as to the repairs. In yearly tenancies the repairs are very frequently entirely carried out by the landlord. If a tenant takes possession of premises and agrees to pay so much rent *per annum*, and makes no further arrangement, in the view of the law a tenancy from year to year is created, notwithstanding the fact that the tenant may pay his rent monthly. If, however, he agrees to pay so much rent *per month*, a monthly tenancy would be *prima facie* created.

Tenancies for one year and so on from year to year in fact amount to tenancies of two years in duration; because, being for one year, a notice to quit would be of no avail until the expiration of the first year, and then when notice is given it must be a half year's notice expiring on the anniversary of the day upon which the tenancy began. Accordingly, once having entered upon such a tenancy the tenant would not be able to release himself in less than two years.

Quarterly, monthly, and weekly tenancies are all of the same class, and may be determined by a quarter's, a month's, or a week's notice to quit (but as to notice to quit see p. 63). The method of payment of rent is *prima facie* evidence of the nature of the tenancy, and, apart from any other express or implied term of the particular tenancy, notice for the period of the tenancy would hold good.

Tenancies for Terms of Years

In principle the only difference between this form of tenancy and a periodic tenancy is that a tenancy for a fixed term will cease automatically at the expiration of the term, and no notice to quit therefore is required as in the case of periodic tenancies.

CREATION OF TENANCY

Who may be Landlord

Tenancies of all descriptions are usually negotiated through agents, but it is obviously necessary for the intending tenant to consider who his actual landlord may be. There may be much advantage in holding under a particular landlord compared with another. The owner of several blocks of business premises would in all probability prove a better landlord than the small man, the owner of isolated premises, out of which he is looking for his livelihood and upon which he is prepared to spend very little.

A tenant who agrees to accept a lease has no legal right to investigate his landlord's title, and he may possibly find himself in the position of having paid a premium for a lease without having secured a valid grant. It is therefore prudent to make it a condition on the acceptance of a lease that the landlord's title should be fully disclosed.

A question of more importance arises where the owner of a house or lands is under some incapacity to contract. An agreement which is binding on both parties cannot be made with an infant; but the infant owner of property usually contracts through trustees or through the Court, who on his behalf can make a binding lease.

Married women, owners of property, who were married, or the title to whose property accrued, after the 1st January, 1883, can grant valid leases. In other cases the husband must join in the lease or agreement. Limited owners of property may also grant leases under the powers of the Settled Land Acts. (See Chapter XX of this Part.) A considerable amount of property all over the country is subject to mortgage, and it was at one time necessary for both mortgagor and mortgagee to join in any lease; but since the 1st January, 1882, unless the provisions of the Conveyancing Act, 1881, are specially excluded, a

mortgagor or mortgagee in possession may grant valid leases—an ordinary occupation lease for twenty-one years, or a building lease for ninety-nine years.

The Agreement

There are usually two stages in the process of creating a tenancy. In the first stage the landlord or his agent enters into an agreement with another party to grant a tenancy on certain terms. In the second stage the tenancy is in fact created, which is done sometimes by the execution of the lease and sometimes by the tenant taking possession of the premises.

By Section 4 of the Statute of Frauds an agreement concerning any interest in land—such as a tenancy agreement—will be invalid unless in writing and signed by the party to be charged. Accordingly, when the landlord and prospective tenant enter into a tenancy agreement, no matter whether it is for a weekly tenancy or for a lease for a long term of years, in order that it may be enforceable in the Courts it must be in writing.

Dealing with the second stage, the actual lease itself will be quite valid if made by parol, provided the term does not exceed three years in duration. A lease for a term of more than three years must not only be in writing but under seal; although as a lease not under seal can now be enforced as an agreement, the absence of seal may not be a more serious matter than the cause of additional expense.

A three years agreement is a very usual form of short lease, being for the longest term that is permitted without its being necessary for the instrument to be under seal. The three years is calculated from the day the agreement is made. Consequently an agreement for a three years tenancy drawn up to commence a month from the date upon which the agreement is executed would have to be under seal, because from the day of making its duration is three years and one month.

Execution of a Lease

To execute a lease under seal two things are essential, as in the case of any deed. The first is that the instrument should be sealed, and the second is that it should be "delivered". To seal the instrument it is not necessary actually to affix a seal; all that must be done is to touch the paper "with the intent of sealing", and it does not matter if no mark is made on the document. The modern practice is to insert a wafer on the document to represent the seal. To "deliver" the instrument it is not necessary actually to deliver it to anybody; it is sufficient to do some act or use some expression implying that the instrument is intended to operate from that moment. The delivery should be then attested by two or more witnesses. Strictly speaking the signature of the person may not be essential, but a deed without a signature would give grounds for suspicion.

The act of sealing an instrument must not be confused with the affixing of the revenue stamp, which has nothing to do with the validity of the deed. The stamp simply forms the receipt for the duty payable, and the law provides that a document requiring a stamp and not having one may not be used as evidence in the Courts. (As to "Stamp Duties", see Chapter XXVIII of this Part.)

It is customary for the lessor's solicitor to prepare the lease, which is then submitted to the lessee's solicitor, who may raise any point and arrange for any alteration that may be necessary. Two copies of the draft lease are then engrossed, the lessor executing one and the lessee the other; the lessee is given the one executed by the lessor, which is known as the lease, and the lessor the one executed by the lessee, which is termed the counterpart. The lessee bears the cost of preparing the lease.

It is important to bear in mind that a tenant cannot acquire a right against his landlord through holding under him. For example, a tenant of a house cannot acquire for the next house, of which he is owner, an easement of light or way by reason of the fact that during his tenancy he exercises such a right. (See as to "Easements" Chapter XX of this Part.)

Leases usually contain the following covenants by the lessee: To pay the rent, to pay all rates and taxes except the landlord's property tax, to keep the premises in repair and give them up at the expiration of the term in good repair, to allow the lessor to enter the premises and inspect their condition, to carry out specific repairs when called upon to do so by the lessor, to insure the premises against fire, and not to assign or sublet without the sanction of the lessor; and a proviso is usually inserted that in the event of the lessee failing to comply with his covenants the lessor may re-enter. The lessor, on his part, usually covenants that the lessee shall have quiet enjoyment, limited to the acts of the lessor and those claiming under him; but the use of the word "demise" implies a covenant for quiet enjoyment.

Forms of Tenancy and Lease

The following are short forms of an agreement for annual tenancy and a lease for a term of years.

They are given merely to serve as an indication of some of the usual stipulations. It would be very unwise for anyone whose experience of tenancies is limited to enter into any sort of agreement for taking any class of premises without having professional advice as to the premises and as to the preparation of the agreement. In taking premises, such as an office or shop forming part of a building, or a house on an estate, it is usual for a common form of agreement to be entered into by all the tenants, but such an agreement should be carefully considered before it is signed.

When an ordinary lease of premises is taken, it is usual for the lessor to have the lease prepared at the cost of the lessee, who should himself be professionally advised upon it.

Agreement for Annual Tenancy of Business Premises

AGREEMENT made the ..... day of .... between A. B., of ....., hereinafter called the tenant of the one part and C. D., of ....., hereinafter called the landlord of the other part.

The landlord agrees to let and the tenant agrees to take from the ..... day of .... from year to year the premises known as No. 50 West South Street, Walworth, in the County of London, comprising ground-floor shop, and room at back, with basement thereunder, on the following terms, until the tenancy shall be determined as hereinafter mentioned:—

The rent to be £60 per annum, payable on the usual quarter days, the first payment to be made on .....

The tenant shall pay all rates, taxes, and outgoings now payable.

The tenant shall keep such premises, including the fixtures, in good condition and tenantable repair, reasonable wear and tear excepted. The tenant shall be at liberty to remove his fixtures within six weeks of the determination of the tenancy.

The tenancy shall be determinable on either party giving six months' notice to the other, to expire [on the quarter day on which the tenant entered].

The tenant shall insure the premises in an office to be approved by the landlord for the amount of .....

(Any other stipulations as may be agreed.)

In witness thereof, &c..

Lease for Seven Years

THIS indenture made the ..... day of ..... BETWEEN A. B., of ....., in the county of ....., (hereinafter called the lessor) of the one part, and C. D., of ....., in the county of ....., (hereinafter called the lessee) of the other part.

WITNESSETH that, in consideration of the rent hereinafter reserved and of the covenants hereinafter contained, the lessor doth hereby DEMISE unto the lessee, his executors, administrators, and assigns

ALL THAT house and land known as No. 80 Southampton Street, ..., with the yard and premises in the rear, more particularly described in the schedule hereto and delineated in the map hereof on the plan and thereon coloured green,

TO HOLD the same UNTO the lessee, his executors, administrators, and assigns from the ..... day of .... for the term of seven years,

YIELDING AND PAYING therefor, during the said term, the yearly rent of £....., clear of all deductions, by equal half-yearly payments on the..... day of ..... and the ..... day of ..... in every year, the first of such payments to be made on the ..... day of ..... next.

AND the lessee doth hereby for himself and his assigns covenant with the lessor, THAT he, the lessee, his executors, administrators, and assigns, during the said term, will pay the yearly rent hereinbefore reserved and duly perform the following covenants:—

Will pay all rates and taxes and outgoings now payable [or hereafter to become payable in respect of the premises];

Will not assign, underlet, or part with the possession of the said premises without the written consent of the landlord, such consent not to be unreasonably withheld;

Will during the said tenancy keep the said premises and all fixtures, painting, paper, and all decorations thereof in good and tenantable repair. [Such terms as to painting inside and outside or structural repairs as may be agreed];

And at the expiration or sooner determination of the said term so yield up the same to the lessor, his heirs, and assigns;

And will permit the lessor, his heirs, and assigns, or his or their agents, or workmen, at all reasonable times during the said term to enter upon and inspect the said premises;

AND THE LESSOR doth hereby for himself, his heirs, executors, administrators, or assigns covenant with the lessee that he the lessor at all times during the said term:—

[Will adequately insure the said premises against fire, and in case of destruction or damage by fire will replace or repair the same];

And that the lessee shall be at liberty, within six weeks of the determination of the tenancy, to remove all tenant's fixtures placed in the premises by him;

And that the lessee, so long as he shall pay the said rent and perform the said covenants on his part to be observed, may quietly hold and enjoy the said premises during the said term, free from interruption by the lessor or any person claiming through him;

Provided always that if the said rent or any part thereof shall be in arrear for 21 days after the same shall become due, whether demanded or not, or there shall be a breach of any of the covenants on the part of the lessee herein contained, the lessor shall be at liberty to re-enter upon the said premises after notice duly given in writing to the tenant, and thereupon the said term shall absolutely determine.

IN WITNESS whereof the said parties hereto have hereunto set their respective hands and seals the day and year first above written.

THE LIABILITIES OF LANDLORD AND TENANT

The liabilities of each party depend upon the terms which are usually provided for by the written agreement. From mere occupation an obligation is not implied to pay rent, but any agreement to pay can be enforced.

In short-period tenancies the landlord usually does everything, and in yearly tenancies and in other short terms the tenant usually agrees to keep the property in good tenantable condition, the landlord doing outside repairs and the tenant inside. Leases for seven, fourteen, or twenty-one years are common, and in that case the lease is usually a repairing one, but a tenant should be most careful in examining the conditions as to repairs. (See further, p. 56.)

Apart from any agreement between landlord and tenant, a tenant is not excused from paying rent because the premises have been destroyed by fire, flood, tempest, or riot, or if for any reason they become uninhabitable. Unless a tenant has covenanted to keep in repair and has not excluded damage by fire, he is not bound to reinstate. He should, however, see that he is exempted from liability or insured, and, when insuring, loss during rebuilding should be covered.

A landlord is not obliged to rebuild even though he has received the insurance money.

Rent

Provisions for the payment of rent necessarily are of the first consideration in any agreement. Payment for a mere license over land is not, however, rent, and therefore cannot be recovered by distress, the primary and special remedy for the recovery of rent. Payment by royalties is only another form of payment of rent.

Rent is due on the morning of the day appointed, but is not in arrear until the morning of the following day. If the landlord intends to forfeit the lease, the rent must be formally demanded, and is ordinarily payable on the land. The tenant who has covenanted to pay rent, however, has imposed upon him the duty of seeking out and tendering payment, strictly speaking in cash, although the right to receive in cash may be waived. This may in certain cases impose a slight expense upon the tenant in remitting the money. He must also see that he pays direct to the landlord or his authorized agent. The latter may be one authorized to receive expressly, or may be a person who has previously been paid, or an agent or steward whose recognized duty it is to receive rents. The tenant who pays anyone else may be called upon to prove the authority of such person to receive on the part of the landlord. Rent is now regarded as accruing from day to day. In cases where there is a change of ownership during the continuance of the tenancy the rent may have to be apportioned to the particular term. This does not trouble the tenant, because under statutory provisions his duty will be to pay the representatives of the heir or other incoming landlord, whose duty it will be to pay over to the representatives of the late landlord such proportion of the rent as may be due. Rent cannot be recovered if the tenancy is for an immoral purpose.

Although distress is the most effective remedy, an action can be brought for the recovery of rent under an ordinary tenancy within six years (except agricultural holdings, see p. 67), or under a tenancy made by deed within twenty years.

If a tenant holds over, and nothing is said and no rent paid from which a new tenancy may be

implied, and if after having been served with a notice by the landlord he refuses to go out, he will be liable, so long as he remains in possession, to pay "double value". This is a sum equal to double the yearly value, not necessarily the same amount as double the rent, of the premises.

Again, when a tenant, after having given the landlord notice to quit, remains in occupation after the notice has expired, unless it can be proved that the parties have expressly or impliedly agreed to a new tenancy, the tenant will be liable to pay "double rent", which may be recovered by action or distress.

If a tenant wishes to remain in occupation for a short time after the expiration of his tenancy, as a rule, provided the landlord has not already let the premises, there is no difficulty in getting permission. If, however, he desires to remain in occupation for any length of time, and accordingly pays rent, he should take care to have it recorded that there is no agreement for a yearly tenancy. He should continue in occupation, say, as a monthly tenant or as a tenant at will.

If the tenant holds over without the landlord's sanction, in spite of the fact that the landlord may not have given him notice and so is not entitled to bring an action for double value, the landlord can recover a sum for use and occupation. Moreover, if owing to the fact that he has held over, the landlord has either lost a prospective tenant or has had to compensate an incoming tenant, he will be liable to the landlord for his loss.

Rates and Taxes

The agreement or lease invariably stipulates what rates and taxes are to be paid by the tenant. On a lease or agreement for years it is usually provided that the tenant shall pay all rates and outgoings, with the exception of landlord's property tax. This may easily operate as a hardship upon the tenant where unusual and unexpected burdens are imposed upon the property under the provisions of new Acts of Parliament not in contemplation of either party at the time. In the ordinary way, however, the tenant who agrees to pay the rent, free of all usual outgoings, or a "net rent", does not burden himself with the charges for permanent improvements made upon the property or new charges of an unusual character. Property tax is payable in the first instance by the tenant, but the landlord is bound to allow him to deduct it from his next payment of rent, under a penalty of £50. The tenant should be careful to deduct it from the *next* payment, as he is not legally entitled afterwards to deduct it.

On less than annual tenancies, and on tenancies of offices and flats, it is customary for the landlord to pay practically all outgoings, with the exception of inhabited house duty. Under ordinary circumstances, where there are no stipulations, the tenant must pay inhabited house duty, poor rate, general district rate, and water rate, and he will naturally pay also for gas or electric light or power according to agreement. The rates and taxes payable by the landlord are always property tax, which is Schedule A of the Income Tax, and tithe-rent charge, if any, which can in no case be made payable by the tenant; also usually the land tax and any special rates or assessments under local Acts, which may all, however, be made payable by agreement by the tenant. The whole of the rates on woods and plantations not subject to rights of common or sporting, and half the rates in respect of mines, other than coal mines, are assessed upon the owner. On a furnished house the landlord would pay all rates.

The poor rate and the general district rate are in nearly every case imposed upon the occupier, although in the case of tenancies of small properties (of rateable value in London, £20; Liverpool, £13; Manchester and Birmingham, £10; and other places, £8) the landlord may agree to compound for the poor rate, paying the rates himself on the premises, whether occupied or unoccupied, and receiving a discount. Similarly, in the case of small tenancies the general district rate may, at the option of the urban authority, be assessed on the owner. Under circumstances in which the landlord has agreed to pay rates and the tenant is called upon to pay, the tenant may deduct the rate from his next payment of rent. Rates and taxes have been discussed generally elsewhere. (See Part I, Chapter VIII.)

Repairs: The Tenant's Liability

In every properly drawn lease of any premises there are covenants specifying by which party and in what manner the necessary repairs are from time to time to be carried out. In addition to the general repairing covenants there are usually set out certain specific covenants for the execution of such works as painting, papering, &c.

In the unlikely event, however, of all reference to repairs being omitted from the lease, the tenant will not be free from all liability. It will be his duty to use the premises in a tenant-like manner, and to refrain from committing waste. "Waste" is technically of two kinds, "voluntary" and "permissive". The former is some wilful act, as pulling down or damaging some part of the premises; even to pull down or deface some structure erected by the tenant himself is waste of this character.

Any tenant is liable for acts of voluntary waste. For acts of "permissive" waste, in the absence of agreement, the tenant would only be liable if they were of an exceptional character.

When there is a repairing covenant in a lease the tenant's liability for repairs is based upon the interpretation of this covenant, taken in conjunction with all other covenants. It must be borne in mind that many of the expressions used have a special meaning, owing to the interpretations put upon them by the Courts. An expression frequently employed is "good tenantable repair", meaning that repairs carried out are to be such as, taking into consideration the age, character, and locality of the premises, would render them reasonably fit for the occupation of a reasonably minded tenant of the class likely to take them.

Where a tenant undertakes to "repair and keep in repair" the premises, in measuring his liability as to the extent of repairs, regard is to be had to the age of the property at the time the lease is entered into. This form of covenant is a continuing covenant, and the tenant must keep the premises in repair throughout the term. Again, under this covenant, unless there are other covenants which either expressly or impliedly alter its effect, the lessee will not be at liberty to carry out any alterations on the premises that require any part of the premises to be pulled down, even if it only be to the extent of forming a new doorway.

The lessee's liabilities are not reduced in any way by the fact that the lessor intends to pull down at the expiration of the lease. A lessee's liability for breach of covenant to repair dates from the execution of the lease.

Repairs: Landlord's Liability

Subject to the Housing, Town Planning, &c., Act, 1909, and apart from any express agreement, there is no liability on the part of the lessor to repair. Even if at the time he lets the premises they are ruinous and uninhabitable, he will be under no obligation to render them fit for habitation. At the same time the tenant will be under compulsion to pay rent.

Liability under the Housing, Town Planning, &c., Act

This Act affects certain classes of tenancies. By Section 14 it is an implied condition in letting a dwelling house that at the commencement of the tenancy it is in all respects reasonably fit for habitation, where the rent does not exceed (*a*) in London, £40; (*b*) in any borough or urban district where the population exceeds 50,000, £26; (*c*) elsewhere, £16. The undertaking, however, will not be implied when the letting is for a term of not less than three years and the tenant is under a condition to make the premises reasonably fit for occupation.

Power is given to the local authority and the landlord to enter the premises. If the landlord has not complied with his undertaking, the local authority may serve him with a notice calling upon him to do so, specifying what works are necessary; the notice to be of not less than twenty-one days. The landlord may, within twenty-one days, declare his intention of closing the house, and thereupon a closing order will become operative.

If the notice is not complied with, and the landlord does not give notice of his intention to close the premises, the local authority may do the work and charge the landlord.

The owner of premises may be served with a notice to abate a nuisance under the Public Health Acts, arising from the want or defective construction of a building or its sanitary conveniences (and see as to "Nuisances", Chapter XXIV of this Part).

Remedies for Non-repair

Where a landlord covenants to repair, and fails to comply with the covenant, the tenant has the following means of redress open to him:—

(*a*) He may bring an action on the covenant, but before so doing he must give the landlord notice of the want of repair.

(*b*) He may do the repairs himself, and either sue the landlord or deduct the cost from the rent; but the latter course has its dangers, because the landlord might still be entitled to distrain for the full rent, and so recover the amount deducted.

Failure by the landlord to comply with his covenant to repair does not entitle the tenant to quit.

If the tenant fails to comply with his covenant to repair, the landlord has the following remedies open to him:—

(*a*) He may bring an action for damages, the measure being, not the cost of putting the premises into repair, but the amount by which the reversion is depreciated.

(*b*) Provided the lessor has reserved the power to enter the premises, he may enter and carry out the repairs himself and charge the lessee with the cost. Otherwise the lessor has no power to enter the premises.

(*c*) He may commence proceedings for forfeiture if there is a proviso for re-entry in the lease in the event of breach of covenant to repair. As a rule such proceedings do not go further than the service on the tenant of a Schedule of Dilapi-

dations, specifying the breach complained of, which is the first step to take when proceedings for forfeiture are contemplated. This document must give the specific works required to be carried out, as it is not sufficient to indicate them in general terms.

If the Schedule is served at the end of the term, it is generally more satisfactory to both parties that the tenant should pay down a sum of money rather than carry out the work. Under these conditions the landlord is generally prepared to take less than the work would actually cost, because it is to his advantage, as possibly the incoming tenant's taste will not be the same as that of the outgoing tenant, and as a result a great deal of the decorating might have to be done over again. This fact gives the tenant somewhat of an advantage when negotiating terms.

Where the Schedule is served some time before the expiration of the term, it is generally advisable for the tenant to confer with his landlord, because requests are frequently made in the Schedule which are not insisted upon.

If the tenant does not comply with the notice in due course, an action for ejectment should be commenced.

FIXTURES

The law with regard to fixtures was originally very drastic although simple. Any article once attached to the freehold became part and parcel of it, and as much the property of the freeholder as the freehold itself. Gradually the severity of this law was relaxed to meet the exigencies of trade and convenience.

When an article which at one time belonged to the tenant becomes attached to the freehold, under certain circumstances, in spite of the fact that the tenant may have fixed it there with the intention of subsequently removing it, he may not be legally entitled to remove it.

The expression "fixtures", as usually employed, includes articles that are exempted from the operation of this law and which may be removed by the tenant. They may be grouped under three heads, namely:—

1. Fixtures used for ornament and convenience.
2. Fixtures used for trade purposes.
3. Fixtures used for agricultural purposes.

Fixtures Used for Ornament and Convenience

To determine whether or not an article attached to the freehold is a tenant's fixture, the following points should be taken into consideration:—

(*a*) *The Terms of the Lease or Agreement.*—Any terms in the lease or agreement to the effect that certain articles attached are or are not to be regarded in the light of tenant's fixtures will be binding. A tenant should be careful not to sign any agreement by which his ordinary rights of removal are taken away.

(*b*) *The custom prevailing in the locality*, which, apart from any agreement to the contrary, will hold good.

(*c*) *The object or purpose of the tenant* in attaching the chattel to the freehold is an important factor in the determination as to whether the chattel is a tenant's fixture or not. The object or purpose is not ascertained from what was said or thought at the time by the person attaching the article, but from the evidence afforded by the nature of the chattel and the method of attaching it to the freehold. If the chattel is of such a nature that it could only be attached for the purpose of enjoying it as a chattel and without the intention of permanently improving the freehold, then it will be classed as a tenant's fixture.

In this category would be included such articles as mirrors, tapestry, wainscoting attached with screws, and cupboards fixed with holdfasts.

Again, (*d*) *the extent of annexation* is another important test as to the intention of the parties. If a fixture is attached in such a way that its removal would cause substantial damage to the freehold or to the fixture itself, this would go to show that it must have been the intention of the parties to annex it for the permanent improvement of the freehold and not to take it down again. The greater the damage likely to be caused to the fixture or to the freehold the stronger is the evidence that it was intended to remain attached.

In certain cases chattels, though not directly attached to the freehold, are an essential part of fixtures which are permanently annexed. An example of such a case is the key to a door, which, although not actually attached, ranks as a fixture.

It may happen that, when the tenant takes possession, certain articles which really rank as tenant's fixtures may have been acquired by the landlord, and they remain his property, unless, of course, they are purchased by the tenant. Such articles would usually be set out in a schedule to the agreement. In other cases the incoming may take over fixtures from the outgoing tenant.

If a tenant does not remove his fixtures before the expiration of his term he loses his right to remove them, and they become the property of the landlord. For this reason, when a tenant's term expires and he renews his lease, unless express provision is made that the fixtures shall remain vested in him, they pass to the landlord. But a tenant should have a clause inserted in the agreement giving him liberty to remove his fixtures within a certain short time after the termination of his term; also, on renewing his tenancy, he should have it made clear that his fixtures are scheduled as his and removable by him.

Trade Fixtures

Much greater latitude is allowed to the tenant with regard to the removal of trade fixtures than is the case with ordinary fixtures. A tenant may remove during his term any fixture that he has annexed to the freehold for the purpose of trade or manufacture, provided that—

(*a*) It is not contrary to any express or implied term in his lease and tenancy agreement;

(*b*) It is not contrary to the custom prevailing in the locality;

(*c*) The chattel can be removed without causing substantial damage to the freehold;

(*d*) The article attached was of a chattel nature before attachment and will not lose its chattel nature by its removal.

A tenant, other than the tenant of a market garden or nursery, is not entitled to remove trees or shrubs planted on the premises.

Agricultural Fixtures

(See p. 66)

ASSIGNMENT AND SUB-LETTING

A lessor may sell his property subject to the lease or agreement, or, as it is termed, assign his reversion, in which case a new landlord is substituted. When nothing is stated in the lease or agreement a tenant is free to assign or sub-let. He does not thereby escape from his covenants, but remains liable to his lessor, and he should make the assignee or sub-lessee liable to him. If he enters into an assignment of the whole of his term with the consent of the lessor, the lessor may accept the assignee in his place, but a lessee still remains liable on an express covenant. It is common for a lessor to stipulate that the lessee shall not assign or underlet, but a tenant should not enter into this unqualified agreement. The fair stipulation is that the tenant shall not assign or sub-let without the previous consent in writing of the landlord, such consent not to be unreasonably withheld. Under these circumstances, if the tenant is prepared with a suitable assignee or sub-tenant and the landlord withholds his consent, the tenant may treat the refusal as unreasonable and proceed without consent. A sub-tenant does not come into any relationship with the landlord and is not answerable to him; he is the tenant of the tenant. The assignee becomes liable to the landlord for some, although not all, of the covenants contained in the lease. Covenants relating to the premises themselves and something already in existence there—as for repairs—bind the assignee in all cases; while a covenant to build on the land would only bind the assignee if assigns are expressly mentioned. Personal covenants or covenants to do something not on the land do not bind an assignee in any case. An assignee is not only bound by tenant's covenants but is entitled to the benefit of similar landlord's covenants. All assignments of a term, however short, must be in writing.

At the end of the term it is the lessee's duty to give vacant possession, and if the lessee gives up the premises with a sub-tenant in possession the lessee is liable to compensate the lessor for any expense he may incur in ejecting the sub-tenant and getting vacant possession.

BANKRUPTCY OF LESSEE

It is a usual practice to insert a proviso for re-entry in a lease, in the event of bankruptcy, which enables the lessor to get possession of the premises if he deems it advisable. The lessor will, however, lose his right to re-enter if he does some act, after an act of bankruptcy, or after the adjudication in bankruptcy, indicative of a subsisting tenancy, such as receiving rent or distraining.

In the case of an onerous or unprofitable lease the trustee in bankruptcy is under certain conditions entitled to disclaim it.

A landlord is entitled to distrain after the bankruptcy of his tenant, but he can only recover six months' rent so far as the rent due prior to adjudication is concerned. He may, however, prove under the bankruptcy for the remainder. He is

entitled to recover by distress all rent that may fall due after adjudication.

After the landlord has re-entered for forfeiture the trustee loses his right to remove the tenant's fixtures. (See further, as to Bankruptcy, Chapter XI of this Part.)

DISTRESS

"Distress" is a summary remedy conferred by law on the landlord to enable him to recover rent due and in arrear. Unlike all other legal remedies proceedings can be taken without resort to any court of law; though their abuse, or alleged abuse, often leads there in the end. "Distress" entitles a landlord to enter the premises, upon which the rent is reserved, without leave and without giving notice, and to seize any goods or chattels. If the tenant does not pay the rent and the costs of the levy within a given time, the goods and chattels seized may be sold for the purpose of recovering the amount.

Levying Distress

To entitle anyone to distrain it is necessary that—

1. The relationship of landlord and tenant should be subsisting at the time the rent for which the distress is issued falls due.

2. A specific rent must have been reserved.

3 The rent must be payable at a time certain.

4. The person on whose behalf the distress is effected must be entitled to the reversion.

The right to distrain is an unusual remedy, conferred by law on the landlord, and apart from express agreement does not exist in any other relations than those of landlord and tenant. For example, where a tenant "holds over" after the determination of a lease, unless it can be proved that there is an agreement, implied or otherwise, between the parties for a new tenancy, the original landlord will not be entitled to distrain. For the same reason no distress can be made in respect of any periodical or other payment due in respect of some easement or privilege.

When a leaseholder sublets for the full duration of his own lease he loses his right to distrain for the rent; if, however, the property reverts to him, even if only for a day, he will retain his right of distress.

Goods Privileged from Distress

Exceptions have arisen to the general rule which have modified the force of the old law and in some cases supplemented it. Certain goods are privileged from distress, some absolutely, others conditionally.

Goods which must not in any case be taken under distress are:—

1. Fixtures.

2. Goods delivered in the way of trade.

3. Goods of a perishable nature; and goods of a guest at an inn.

4. Goods in actual use at the time of distress.

5. Wild animals, but not when under control, as deer in a park.

6. Goods in the custody of the law, as where they have been taken in execution.

7. Goods which if seized could not be restored in the same condition; hence loose money is not distrainable, though money in a bag is.

8. Straying cattle.

9. Wearing apparel and bedding of the tenant and his family, and tools, to the value of £5.

10. Agricultural machinery and breeding stock —not the property of tenant—to which the Agricultural Holdings Act applies.

11. Gas, water, electric, and hydraulic meters, fittings, and machinery, being the property of the supply company.

12. Frames, looms, and apparatus employed in textile manufactures, not the property of the tenant.

13. Rolling stock of a railway company.

14. Goods of a lodger, sub-tenant, or stranger (see p 61).

15. Goods of an ambassador or minister of a foreign State and his servants.

Certain articles, although not exempt, are partially privileged from distress. The landlord is not entitled to seize them so long as there is other sufficient distress upon the premises which is immediately available to pay the arrears of rent by sale.

The articles in question are as follows:—

1. Tools and implements of trade not actually in use.

2. Beasts of the plough and sheep.

3. Agisted live stock, under the Agricultural Holdings Act (see p. 67).

These are the recognized classes of goods privileged from distress, but anyone responsible for levying a distress should be most careful to see that in this and in all other respects no risks are taken.

Proceedings in Distress

A distress may be levied on the day after the rent falls due, but not on the day. No notice need be given before effecting a levy. Great care should always be taken, as actions for illegal or excessive distress are common, and if any illegality is committed, sympathy invariably goes with the tenant.

A distress must be levied between the hours of sunrise and sunset; but there should be no question about the hour, and a distress should be levied during the ordinary hours of business.

When a tenant remains in possession after the expiration of the term, the landlord may distrain for rent due within a period of six calendar months from the expiration of the tenancy; but this right only exists where the tenant holds over. Where a new tenancy has been entered into between the parties, the landlord loses his right to distrain for arrears on the old tenancy.

A distress may only be levied on the demised premises, but there are certain exceptions:

(*a*) In cases of fraudulent or clandestine removals to avoid distress, the landlord may follow up the goods and distrain within thirty days.

(*b*) Cattle upon common lands driven off to avoid distress, if seen on the premises by the landlord when entering the premises to distrain.

Apart from the person entitled to distrain, only a bailiff certificated by a County Court judge may execute the levy. A bailiff should be given a distress warrant.

To

Mr. A. B.,

My bailiff.

I hereby request and authorize you to seize in distress the goods and chattels in and upon the house and premises of (here set out name of tenant, address of premises, the amount of rent due, and when due), and to proceed thereon for the recovery of the said rent as the law directs. But I hereby expressly prohibit you from taking any property not legally liable to a distress for rent.

Dated,

Signed C. D.
(or his agent).

The distrainer is not entitled to break into the premises. He may enter the premises by the usual way and the usual means. He may enter through a door by raising a latch or opening it in the ordinary way, but he most not employ unusual means or force. He may enter through a window if it is open, and if not open wide enough he may open it wider; but if it is not open, although it may be unlatched, to open it and enter would be unlawful. Once, however, entrance has been gained, the distrainer is entitled to break open internal doors, &c., if necessary to effect the distress. Force may be employed to effect an entrance only where the distrainer has been expelled, or on leaving the premises has not been allowed to re-enter, or in a case of fraudulent removal. These absurd technicalities illustrate the ancient character of the remedy and the modern efforts to curb its license.

To seize the distress it is not necessary to lay hands on or move the goods. All that is required is some formal act indicating that possession has been taken.

The distrainer then serves a notice of distress upon the tenant, giving an inventory of the goods seized and the amount due.

To impound means to place the goods in possession of the law; to effect this the distrainer may either remove the goods or leave them on the premises; the impounding is presumed to commence from the time of service of the notice. The goods must remain in pound at least five days, to be extended to fifteen days on the written request of the tenant. The distrainer is not entitled to use anything he has distrained upon. On the other hand, the owner is entitled to make what profit he can of goods while under distress.

If cattle are moved to a pound it must not be at a greater distance than three miles, and the distrainer is bound to feed them.

Sale

Unless the goods are replevied they may be sold at the end of the five (or fifteen) days.

The landlord may not strictly be bound to sell by auction, but he should always do so unless requested otherwise by the tenant. He must secure the best price, and on no account must he purchase himself. He is entitled to sell upon the premises unless the tenant requests him to remove the goods elsewhere for that purpose; in which case the tenant will have to pay the cost of removal and be responsible for all damage caused thereby to the goods.

Costs of Distress

The landlord is only entitled to charge the scale charges for the costs of distress and, on request, the bailiff levying a distress is bound to produce a copy of the list of charges. The fees, charges, &c., may be taxed by the registrar of the district County Court. If a greater charge is made, the person charging renders himself liable to a penalty.

If the tenant pays the rent due before the bailiff actually enters he will not be liable to any costs at all.

Interference with Distress

If a tenant removes his goods for the purpose of avoiding distress, or any third party wilfully and knowingly assists him, they render themselves liable to a penalty. If at the time of removal the rent was not actually due there would be no liability, although the removal might have been for the purpose of avoiding the distress.

If anyone removes the goods while under distress or impounded, or breaks into a pound, he renders himself liable to severe penalties.

Wrongful Distress and the Remedies open to Party Aggrieved

If a distress has been illegal, irregular, or excessive the aggrieved party has several means of redress open to him. In any case he may bring an action for damages; if it is a case of illegal distress he may bring an action under the statute and recover double the value of the goods distrained. If he does not want damages, but wishes to get back the articles seized, he may bring an action for Replevin. He may apply to a court of summary jurisdiction in the following cases: (*a*) When the goods seized are the wearing apparel and bedding of a tenant and his family or the tools and implements of his trade to the value of £5; (*b*) in the case of tenancies within the Metropolitan Police District, when the rent does not exceed £15 per annum, and in the case of weekly or monthly tenancies, irrespective of the amount of the rent; (*c*) in certain cases under the Agricultural Holdings Act.

Distress on Goods of Under-tenants, Lodgers, &c.

When a landlord distrains or threatens to distrain for rent due from his immediate tenant upon any furniture, goods, or chattels of any under-tenant liable to pay by not less than quarterly instalments, any lodger, or any other person not being a tenant or having any beneficial interest in the tenancy, the latter can get their property released. They must serve upon the landlord or bailiff or agent a declaration in writing stating that the immediate tenant has no right of property in the goods, that they are the property and in the lawful possession of the person making the declaration, and that they are not goods or live stock to which the Law of Distress Amendment Act, 1908, does not apply. (See below.)

In case the person declaring is an under-tenant or lodger he must state (*a*) the amount of rent (if any) then due to his immediate landlord, (*b*) the times at which the future instalments of rent fall due and their amount, and (*c*) that he undertakes to pay any rent due and to become due from him to the person distraining until all arrears have been paid. To the declaration must be annexed an inventory of the goods. Anyone making a false declaration is liable to prosecution.

If the landlord proceeds with the distress after having been served with the declaration and having had tendered to him the rent that the under-tenant or lodger may owe to his immediate landlord, he will render himself liable for illegal distress, and the party aggrieved may, on application to a magistrate, obtain an order for the return of the goods so distrained.

After the under-tenant or lodger has made the declaration to the superior landlord, he will stand in the relation of tenant to the superior landlord, who will be entitled to recover rent accordingly. The under-tenant will be entitled to deduct all payments made on account of the distress from the rent due to his immediate landlord. To avoid distress the superior landlord may, as it were, step over the head of his immediate tenant and serve a notice on the lodger or the under-tenant, stating the amount of rent in arrear, and requesting him to make all future payments of rent direct to him.

The following goods are exceptions from the benefit of the Act:—

Goods belonging to the husband or wife of tenant; goods comprised in any Bill of Sale or hire purchase agreement or settlement made by the tenant; goods in the possession, order, or disposition of the tenant, by the consent or permission of the true owner, under such circumstances that such tenant is the reputed owner (see "Bankruptcy", Chapter XI of this Part); and any live stock to which Section 29 Agricultural Holdings Act, 1908, applies (see p. 67).

The Act also has no application to

Goods of a partner of the immediate tenant;

Goods (not being goods of lodgers) upon premises where any trade or business is being carried on, in which both the immediate tenant and under-tenant have an interest;

Goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice to remove the goods and vacate the premises; nor to

Goods belonging to and in the offices of any

company or corporation on premises the immediate tenant whereof is a director or officer or employee.

In the last three cases a stipendiary magistrate or two justices may determine whether in fact goods come within the exceptions.

LIABILITY OF LANDLORD AND TENANT TO THIRD PARTIES

Where any injury is caused to a third party by reason of any defect in the demised premises, the liability falls *prima facie* upon the tenant.

The landlord, however, will be liable if he is under contract to do the repairs himself; or if he has let the premises in a dangerous condition.

Where the landlord has contracted to repair, and anyone is injured when actually upon the demised premises, the party injured has no claim against the landlord; he must proceed against the tenant, and the tenant can then recover from the landlord. On the other hand, if the person injured was not actually on the demised premises, he could proceed directly against the landlord and recover. In the case of flats, where there is a staircase common to all tenants which is maintained by the landlord, the person injured would have a claim against the landlord.

Criminal Liability

A landlord renders himself liable to prosecution under certain circumstances:—

If he lets a house or lodging in which a person has been suffering from a dangerous infectious disorder without disinfecting it to the satisfaction of a duly qualified medical practitioner, and if he gives false answers to an intending tenant when asked as to whether anyone with a dangerous infectious disorder has been living on the premises.

If he or his agent lets premises knowing that they are to be used as a brothel, or is wilfully a party to their continued use for such purposes.

If he enters the premises with force, notwithstanding the fact that the tenant has no longer any right to be in possession. But in order to convict him it will be necessary to prove that violence was employed, or that he had behaved in such a way to those in possession as to give them good reason to fear some bodily harm.

A tenant renders himself liable to prosecution—

(*a*) If he ceases to occupy premises in which anyone has within the previous six weeks been suffering from any infectious disease without either giving the owner notice or previously disinfecting the premises to the satisfaction of a medical practitioner, or if he gives false answers when questioned by the owner or an intending tenant.

(*b*) If he steals any chattel or fixture which is the landlord's property.

(*c*) If he unlawfully and maliciously pulls down any part of the demised premises, or severs any landlord's fixtures from the freehold. But in such a case it will be necessary for the prosecution to prove that the act was done wilfully and without any claim of right.

SPORTING RIGHTS

The right of sporting is part of the ordinary rights over land which, in the absence of special agreement, pass to a tenant. Sporting rights, however, are often the subject of special reservation, and are granted apart from the land. They are technically known as a *profit à prendre*, and must therefore be transferred by deed. (See Chapter XX of this Part.)

A lease of sporting rights will generally contain elaborate provisions for keeping up the head of game; but yearly agreements are common enough.

Rights of sporting must be exercised in a reasonable manner, having regard to the primary use of the land. Injury must not be done to crops by passing over the land, nor must game be allowed unduly to overrun it. The right of fox-hunting over land can only be exercised by permission, and in itself is often the subject of payment, but largely depends upon good feeling and sporting instinct.

The tenant has certain rights with regard to sporting, co-extensive with those of any person who may possess sporting rights, under the Ground Game Act, 1880.

Every occupier of land has as incident to and inseparable from his occupation of the land the right to kill and take ground game, i.e. hares and rabbits, thereon concurrently with any other person who may be entitled to kill and take ground game on the same land, subject to certain limitations. The occupier himself and one other person authorized by him in writing are the only persons entitled to kill game with firearms. Each person must have a gun licence, but need not have a

game licence. The other person authorized by the occupier must be either a member of his household resident on the land, or a resident visitor, or a person *bona fide* employed by him for the purpose of keeping down game. Every such person must, on demand, produce his written authority to the person who has the concurrent right of shooting over the land. The occupier cannot be divested of his statutory rights by agreement.

DETERMINATION OF TENANCIES

Tenancies may be determined in various ways:—

(*a*) Where the tenancy is for fixed term, by effluxion of time;

(*b*) On the happening of the event which may be a condition of the termination of a tenancy for a fixed term;

(*c*) At any time in tenancies at will;

(*d*) By notice to quit;

(*e*) By surrender;

(*f*) By merger;

(*g*) By forfeiture.

Notice to Quit

In the case of tenancies for a fixed period no notice to quit is necessary, because they naturally cease on the expiration of the term.

A notice to quit is the means by which a periodic tenancy may be determined. It is open to either landlord or tenant, and if notice is served in proper form and in due time the tenancy will be determined at the expiration of the term of the notice.

The law regards notices to quit with a jealous eye, and therefore it is most important that anyone who has to do with such matters should have a clear idea of what are the essentials of a valid notice. A notice to quit given by word of mouth is perfectly valid, but owing to the difficulty of proof in the event of dispute it would be extremely unwise to adopt this method of giving notice.

For a notice to be valid it must comply with the following requisitions:—

(*a*) The notice must be expressed in such terms as to leave no doubt in the mind of the person receiving it as to its exact meaning. A conditional notice that depends upon some act or event taking place before the expiration of the term is bad. For example, a notice by the tenant: "Unless I receive from my employers an increase in my salary before the expiration of this notice I shall quit", would be void.

(*b*) The notice to quit should be given so as to expire on or with the last day of some period of the tenancy, but the yearly tenancy affords an exception to this rule, and notice should be given in that case so as to expire on the anniversary of the commencement of the tenancy and not the day before. It is important to observe that the notice must expire at the end of a particular period of the tenancy. For example, in the case of a yearly tenancy that began at Christmas the half-year's notice must be given to expire at Christmas, and a half-year's notice expiring at any other quarter-day would be void.

If the party giving the notice is not quite certain as to the date upon which the tenancy expires, some such clause as the following should be adopted, "or at the expiration of your (or my) tenancy, which shall expire next after the end of one half year (or as the case may be) from the service of this notice".

(*c*) Reasonable notice should be given. What is a reasonable length of notice naturally varies according to the character of the tenancy. The Courts have decided that a reasonable notice in the case of a yearly tenancy is one of not less duration than half a year; and in the case of a quarterly tenancy not less than one quarter.

In the case of monthly or weekly tenancies it would be unwise to rely upon a notice of a shorter period than one month with regard to the former and a week with regard to the latter. In the case of yearly tenancies, where the year terminates upon one of the usual quarter-days, a notice to quit in order to be valid must not be served later than on the quarter-day next but one before the expiration of the year of the tenancy. The half-year's notice in such cases forms what is known as a customary half-year, and may be actually more or less than half the days in a year, according to the quarter upon which it expires. Where a yearly tenancy commences upon some day other than the usual quarter-day, but the rent becomes payable upon the usual quarter-days, the year's tenancy will be calculated to commence from the next ensuing quarter-day, and a notice to quit to be valid must expire on the anniversary of such quarter-day. But when the lease expressly provides that the tenancy is to begin on the date prior to the quarter-day, the year will be calculated from that date, and the notice must expire accordingly. Under such circumstances the half-year's notice must not be less than 182 days. In calculating the length of notice, the rule is, that the day upon

which the notice is given is not to be, but the day upon which it expires is to be, included in the calculation.

In the case of agricultural tenancies, which term includes market gardens, it is necessary to give a whole year's notice to quit, unless the parties expressly agree to make it less than this.

(*d*) The notice must be directed to the proper person.

(*e*) The notice must describe the premises in such a way that there can be no doubt as to the premises referred to, and must apply to the entire premises which are held under the particular tenancy.

Form of Notice

From landlord to tenant.—

Sir, I hereby give you notice to quit and deliver up possession of the house, land, and premises at (*here give address*), which you hold of me as tenant, on the (24th day of June next), or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the date of this notice.

Dated the day of 19 .

From tenant to landlord.—

Sir, I hereby give you notice that I intend to quit and deliver up possession of the house and land or premises at (*here give address*), which I hold of you as tenant, on (25th day of December next), or at the expiration of the year of my tenancy, which shall expire next after the end of one half-year from the date of this notice.

Dated the day of 19 .

The Service of Notice

It is not necessary to serve a notice to quit personally. It will be good service if it is served upon a duly authorized agent.

Provided the notice has been served on the agent, it does not matter so far as the party giving the notice is concerned whether the agent informs the principal or not, because service on the agent is equivalent to service on the principal. Where the notice is served upon the party's servant or wife at his place of residence, the latter will be held to be an agent, and the service will be good unless it can be conclusively proved that the agency could not be rightly implied.

A notice, if sent through the post, should be registered, but it will be presumed to have been delivered at the time it would be in the ordinary course of events until the contrary be proved. When addressed to a place of business, provided it is posted in time to be delivered within ordinary business hours, a notice will be held to be duly served on that day, notwithstanding the fact that it may not have come to hand, unless it can be proved that in fact it was not delivered.

When serving a notice it is always advisable to keep a copy endorsed with particulars of the service.

Surrender

A tenant may surrender his tenancy in several ways. He may enter into an express agreement with his landlord to surrender; but for this to be valid it must in all cases be in writing, and where a lease is of such a nature that it is necessary for it to be under seal, the surrender must also be under seal; moreover it will not be valid if the surrender is to take place in future. A surrender should bear a 10s. stamp.

A surrender will also be brought about by operation of law, i.e. by the parties doing some act which implies an intention that the tenancy should be surrendered. The mere relinquishment of the premises is not of itself sufficient evidence of surrender; the landlord must do some act to indicate his acceptance. Going into possession of the premises will be evidence of acceptance, but merely putting a caretaker into possession is not sufficient to indicate this. Nor is the mere acceptance of the keys conclusive evidence that the landlord has accepted surrender; it may well be that he had no other alternative when the tenant handed them to him. In such a case a landlord should make it quite clear that by accepting the keys he is not agreeing to a surrender.

A surrender does not put an end to the liabilities that the lessee has incurred, nor does it affect the rights of sub-lessees to continue in occupation.

Merger

When the lease and the reversion become vested in the same owner, the lease is determined by becoming merged in the larger interest, and in a like manner a shorter is merged into a longer tenancy.

Forfeiture

In most leases there is what is known as a proviso for re-entry. This proviso, in the event of any breach of covenant other than non-payment of rent, entitles the lessor to take proceedings for the forfeiture of the lease. Except where the covenant broken is one against assigning, underletting, or parting with possession, or on bankruptcy or execution, before the lessor can enforce

the forfeiture he must serve a notice on the lessee specifying the particular breach complained of, and giving him reasonable time in which to remedy it. The Court may give relief subsequently on terms. When an action is brought for breach of covenant to pay rent the lessee can appeal to the Court for relief within a period of six months from the time of the forfeiture, on paying the rent due and costs.

If a lessor knows that a forfeiture has been incurred on account of the breach of some covenant, and yet does some act by which he recognizes that a tenancy is still subsisting, he waives the forfeiture; to levy a distress would be such an act.

Ejectment

When a lessor, after an act of forfeiture, is not able to re-enter peaceably, he can get possession by bringing an action for ejectment. And when the premises are not let for more than £20 per annum, and not for a longer term than seven years, there is a cheaper and shorter method open to him by bringing the matter before a court of summary jurisdiction.

Recovery of Deserted Premises

Where the tenant has deserted the premises, and half a year's rent is in arrear and no sufficient distress upon the premises, the landlord may get possession by making application to justices.

The Lodger

In the case of furnished lodgings, as well as in the case of furnished premises, the landlord gives an implied undertaking that the accommodation is reasonably fit for habitation. Again, in the case of lodgings the rules with regard to notice to quit are not the same as in the case of a tenancy. The lodger must give reasonable notice. In the absence of any agreement to the contrary, a lodger has the right to the use of everything necessary to his enjoyment of the premises, such as the door bell or the water closet.

AGRICULTURAL TENANCIES IN ENGLAND AND WALES

The law of landlord and tenant relating to agricultural tenancies must be dealt with separately, because it differs in many respects from the law applying to other tenancies. The law on the subject was consolidated by the Agricultural Holdings Act, 1908.

Compensation to Tenants for Improvements

Where a tenant of a holding has carried out any of the works mentioned below, and before so doing has obtained the landlord's written consent for their execution, on quitting the premises he will be entitled to compensation.

The improvements referred to are: (1) Erection, alteration, or enlargement of buildings; (2) formation of silos; (3) laying down of permanent pasture; (4) making and planting of osier beds; (5) making of water meadows or works of irrigation; (6) making of gardens; (7) making or improvement of roads or bridges; (8) making or improvement of watercourses, ponds, wells, or reservoirs, or of works for the application of water power, or for supply of water for agricultural or domestic purposes; (9) making or removal of permanent fences; (10) planting of hops; (11) planting of orchards or fruit bushes; (12) protecting young fruit trees; (13) reclaiming of waste land; (14) warping or weiring of land; (15) embankments and sluices against floods; (16) erecting wirework in hop gardens.

The tenant of a holding is entitled to compensation for any improvement he may have carried out in connection with the drainage system of his holding, provided that he has given his landlord notice in writing of his intention—showing how he proposes to do the work—not more than three, nor less than two months before commencing. When the landlord receives such a notice he is entitled to make terms with the tenant both as regards the nature of the improvements and the terms of compensation, or he may carry out the works himself and charge 5 per cent per annum on the capital outlay.

The tenant of a holding is entitled to compensation by his landlord in respect of certain other improvements, whether he has obtained his landlord's sanction or given him notice before proceeding or not. These improvements are as follows: (1) The chalking, claying (or spreading blaes upon) land, liming, or marling of land; (2) clay burning; (3) application of purchased artificial or other manure to the land; (4) consumption on the holding by cattle, pigs, sheep, or by horses other than those regularly employed on the holding, of corn cake or other feeding stuff not produced on the holding, or of corn produced and consumed on the holding; (5) laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds sown not

more than two years prior to the determination of the tenancy. Repairs to buildings necessary for the proper cultivation or working of the holding (other than repairs which the tenant is under an obligation to execute), provided that the tenant, before executing any such repairs, gives notice in writing to the landlord with particulars, and does not execute them unless the landlord fails to do so within a reasonable time of such notice.

The landlord and tenant may vary the terms of compensation as to this last class of improvements by agreement in writing. But subject only to that the landlord is not entitled to contract out of his liability and deprive the tenant of his right to compensation. Any other benefit allowed by the landlord in consideration of an improvement and the agreed or customary amount of manure to be returned to the holding are to be taken into account in ascertaining the compensation.

If the parties fail to come to terms with regard to the amount of compensation, the matter is settled by arbitration. The rights of tenants who have paid compensation to outgoing tenants, or who have held during two or more tenancies, are provided for in respect of compensation when they leave.

A tenant of a holding is not entitled to compensation for improvements, other than manuring, that he has effected as tenant from year to year within one year before he quits the holding, or at any time after he has given or received notice to quit, or in any other tenancy within one year before the expiration of his contract. But it is otherwise where, before beginning the improvements, he has given his landlord notice, and the landlord has assented or failed to object within one month, or in a case where the landlord has served a tenant from year to year with notice to quit after he has commenced an improvement in the last year of his tenancy.

If a tenant intends to claim compensation he must give notice of his intention before the determination of his tenancy.

Compensation for Damage by Game

When the tenant of a holding has sustained damage to his crops from game which he has not the right to kill, he can recover compensation from his landlord if the damage exceeds one shilling per acre, but he must give notice as soon as may be after the damage has taken place.

Unreasonable Disturbance

Where a landlord without good and sufficient cause, or for "reasons inconsistent with good estate management", terminates a tenancy, or refuses to renew a tenancy on being requested to do so one year before it terminates, or where he demands an increase of rent, and the increase is proved to be due to the tenant's improvements, and as a result the tenant quits, the landlord is liable to compensate the tenant for all loss and expenses directly attributable to his quitting the holding. In order to entitle the tenant to recover it will be necessary for him, within two months after receiving notice to quit or a refusal to grant a renewal of the tenancy, to give notice to his landlord that he intends to claim; to give the landlord a reasonable opportunity of making a valuation of the goods, implements, produce, &c., the subject of compensation; and to claim compensation within three months after quitting the holding. No compensation is payable where the tenant has died within three months before the date of the notice to quit, or before the refusal to grant a renewal of a lease for years.

Compensation to Tenants when Mortgagee takes Possession

When a person occupies a holding under a contract of tenancy with a mortgagor, which is not binding on the mortgagee—

1. If the mortgagee takes possession the occupier is entitled to any compensation which is or would have been due from the mortgagor to the occupier if the mortgagee had not taken possession.

2. If the contract is for a yearly tenancy or for a term of not more than twenty-one years, and if the mortgagee wishes to take possession otherwise than in accordance with the terms of the tenancy, he must give the tenant six months' notice in writing, and he will be liable to pay compensation for the occupier's crops and any expenditure he has made in expectation of remaining until the end of his term.

Compensation a Capital Outlay

A landlord paying compensation to a tenant may make it a charge on the estate, and limited owners may apply capital money to the payment of compensation. (See also Chapter XX of this Part.)

Fixtures and Buildings

A tenant of a holding may, before or within a reasonable time after the determination of the tenancy, remove any engine, machinery, fencing, or other fixture, or any building which he has affixed or erected, and for which he is not entitled

to compensation, or has not had to provide in accordance with the terms of any contract with his landlord. But the right of removal is subject to the following conditions:—

1. The tenant must pay all rent due, and fulfil all his obligations.
2. As little damage as possible is to be done by the removal, and all damage done must be made good.
3. The tenant must give the landlord one month's notice before removing.
4. The landlord may purchase within one month of notice, the price to be fixed by arbitration.

These provisions apply to any fixture or building acquired though not erected by a tenant since 31st December, 1900, but not to any fixture or building affixed or erected before 21st January, 1884.

Notice to Quit

In the case of an agricultural tenancy, unless it is agreed in writing that a half-year's notice shall be sufficient, a full year's notice is necessary for a valid notice to quit; except where a receiving order in bankruptcy is made against the tenant.

When a landlord requires land for the erection of labourers' cottages or other houses, for gardens to cottages or houses, for allotments for labourers, for small holdings, for the planting of trees, for opening and working mines, gravel pits, quarries, &c., for watercourses or reservoirs, for roads, railways, canals, &c., he is entitled to give notice to quit for part only of the tenancy. The tenant is entitled to a proportionate reduction of rent, but he may convert such notice into a notice for the entire holding, provided he serves the landlord with a notice to that effect within twenty-eight days.

Notice to quit and all other notices in the case of agricultural tenancies may be served on the person to whom it is given either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there.

Freedom of Cropping, &c.

Notwithstanding any custom to the contrary, or any provisions of a contract of tenancy, the tenant of a holding has absolute freedom with regard to cropping of the arable land and the disposal of produce. He must make adequate provision to protect the holding from injury, and in case of disposal of the produce, supply equivalent manurial value. This freedom, however, is not extended to the last year of the tenancy, or to the period following a notice to quit; and if a tenant exercises his rights unfairly the landlord can recover damages, or restrain him.

Distress

A landlord is not entitled to distrain for rent that is more than one year in arrear, unless it has been the accepted practice for payment to be deferred for a quarter or half a year after the rent has become due, when for this purpose the year is to be calculated as from the time the rent falls due, according to the practice.

Live stock belonging to another person, and taken in by the tenant of a holding to be fed at a fair price, is exempt from distress so long as there is sufficient other distress upon the premises. If there is not other sufficient distress, all that can be recovered by that distress is what will cover the price agreed to be paid for the feeding, or such sum as remains unpaid.

Agricultural or other machinery hired by the tenant for the purpose of business and breeding stock are exempt from distress. Disputes are settled by the County Court or a court of justices.

Implied Conditions of Tenancy

In conjunction with every agricultural tenancy the tenant, apart from any express agreement, impliedly undertakes to manage and use the holding in a husbandlike manner according to the custom of the locality.

Market Gardens

Where it has been agreed in writing by an agreement made on or after 1st January 1896, that the holding shall be let or treated as a market garden, the tenant has the same right to remove fixtures or buildings affixed or erected, or acquired by him since 31st December, 1900, for the purpose of his business of market gardener as the tenant of an agricultural holding. (See p. 66.) The tenant is also entitled to remove all fruit trees and fruit bushes not permanently set out. But he must do so before the determination of his tenancy.

In the case of tenancy made on or after 1st January, 1896, the tenant is entitled to compensation for the following improvements:—

1. Planting of standard or other fruit trees and fruit bushes permanently set out.
2. Planting of strawberry plants.
3. Planting of asparagus, rhubarb, and other vegetable crops which continue productive for two or more years.
4. Erection or enlargement of buildings for the business of a market gardener.

Before proceeding to carry out these improvements it will not be necessary to obtain the landlord's permission, or to give him notice, in order to be entitled to compensation.

LANDLORD AND TENANT IN SCOTLAND. (See also p. 229.)

Introductory

In England, as has been seen, a tenant is anyone who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. In Scotland, however, the term tenant is used exclusively to denote the lessee or party to whom a lease is granted. A lease is a contract by which a lessor or proprietor for the time being of lands or other heritable subjects grants to the lessee or tenant the use or occupation of the subjects let during a specific period, in consideration of a stipulated rent or other prestation, and subject to such terms and conditions as may be mutually agreed upon. The contract itself creates a personal obligation between the parties, while possession of the subject let following on the lease confers a real right upon the lessee. Originally the lease took the form of a grant from the proprietor, but owing to the advance of civilization and the improvement of agriculture it became necessary to introduce a variety of conditions obligatory on both parties, and the lease gradually assumed its present form of a bilateral contract. Leases may be divided into two main heads: those of ordinary duration, where the recognized relations of landlord and tenant subsist; and those known as "building" and "long" leases, where the lessee practically acquires the rights of a proprietor during the currency of the lease, subject to payment of rent and the performance of certain conditions as to building, &c., contained in the contract.

We shall first treat of leases of ordinary duration, and at the close make brief reference to building and long leases.

The Constitution and Effects of the Contract

Leases were formerly regarded as merely personal grants conferring no real right to the subject let on the part of the tenant. In order, therefore, to give tenants security of possession against singular successors (i.e. purchasers, as distinguished from heirs) without the necessity of sasine or infeftment, the Act of 1449, c. 18, was passed, whereby possession of the subjects let was substituted for sasine. This statute applies to leases of agricultural subjects, houses, mills, fishings, ferries, harbours, minerals, and whatever is annexed to the ground, but is inapplicable to leases of game, which involve rights of personal privilege rather than real rights. Of course against the granter and his heirs, as distinguished from singular successors, a perpetual lease or a lease where no rent is stipulated, or one where the accruing rents are appropriated prospectively to the payment of a debt due to the tenant, is still effectual. But in order to have the benefit of the statutory provisions it is essential that (*a*) the lease, if for more than one year, must be in writing; (*b*) it must specify a definite term of endurance; (*c*) the rent, which may be in money, grain, or services, must be fixed; and (*d*) the lease must be followed by possession on the part of the tenant. As regards the first of these essentials, the lease should not only be written but contained in a probative document, that is, one formally executed in presence of witnesses. If the writing be not probative the lease may still be valid, provided, in the first place, possession have followed upon it, or, in the second, it have been followed by *rei interventus*, i.e. the occurrence of some circumstance on the faith of the bargain, such as the performance of an act in implement of the contract. A written obligation to grant a lease is equivalent to an actual lease, and a missive of lease, if holograph of the parties or tested, is effectual, if followed by possession or *rei interventus*. A "verbal" lease, that is, one not constituted by probative writing, is effectual for one year only, no matter what the term of endurance stipulated may be, when followed by possession or *rei interventus*. The lease must not only be probative but be duly stamped with the appropriate stamp. A lease which has been entered into by either of the parties through an error *in essentialibus*, as distinguished from mere mistakes as to accessory conditions, or by reason of the fraud of the other party or his agent, is voidable at the option of the party defrauded, if the rescission of the contract has been timeous and not injurious to innocent third parties who, on reliance on it, have onerously acquired rights which the rescission would defeat.

By whom a Lease may be Granted

The lease may be granted by any proprietor whose right to the subjects has been completed by infeftment, that is, by formal possession under a good title. If, however, the proprietor's right is

merely personal at the date of the contract, the lease will be validated as against singular successors by the subsequent completion of his title, provided no mid-impediment has intervened; though so far as the grantor's heir is concerned, he being in law one and the same person as his ancestor, the succession to the property could be taken up by him only subject to the personal obligation of his predecessor. Leases of a wife's heritable estate are valid though granted by the husband, so long as the wife survives and provided the husband's marital rights have not been excluded by a marriage contract or other settlement. If the husband's rights have been so excluded, the wife may grant leases without her husband's consent during their joint lives; otherwise the husband's consent is necessary. Trustees are, by the Trusts (Scotland) Act of 1867, specially authorized to grant leases of the heritable estate of the truster, not exceeding twenty-one years for agricultural lands and thirty-one years for minerals. Curators *bonis*, i.e. factors for minor and pupil children, have now, in virtue of the Judicial Factors (Scotland) Act of 1889, the same powers as trustees. A minor who is without curators may grant a valid lease, but on proof that it has been granted to his disadvantage it may be reduced. If he has curators he may, with their consent, grant a lease for any period that may be agreed on, though it also may be reduced on proof of lesion to the minor. If a lease be granted by such a minor without his curator's consent, no proof of actual lesion to the minor is necessary for its rescission. Generally speaking, it may be said that heirs of entail may grant "ordinary" leases to the extent permitted by the entail statutes, but if this power be exceeded the lease is deemed an alienation of the estate, and as such may be set aside. The right of a proprietor to grant leases is not curtailed by his granting heritable securities affecting his estate, since the radical right still remains with him. But his title may be affected by real diligence against his estate, by his insolvency or sequestration; or if the security, though really a security, takes the form of an *ex facie* absolute conveyance of his property, in which case the rights of proprietorship are transferred to his disponee. A lease by a liferenter is effectual only during the subsistence of the liferent; and a proprietor whose right is burdened with a liferent is entitled to grant leases only with the consent of the liferenter.

To whom Leases may be Granted

The person or persons to whom a lease may be granted are dependent solely on the agreement of the parties. A lease granted to a tenant by name passes to his heir-at-law at his death, if the tenant should die before the expiration of the lease, even although heirs are not mentioned. If granted to two or more persons as joint tenants, the interest of one of the tenants who predeceases the other during the currency of the lease will pass, at his death, to his heir-at-law, and not to the surviving tenant. On the other hand, where the lease is granted to two joint tenants and the survivor and their heirs, each of the original tenants has a joint right during his life, but on his death the sole right in the lease passes to the surviving tenant. A company registered under the Companies Act or a corporation may, as such, be the tenants of a lease; but where it is granted to an ordinary company or firm it is, in practice, customary to take the lease to the partners and the survivors and survivor, as trustees for the firm or company, the partners being bound not only as partners but as individuals. A lease granted to a company is terminated by the dissolution of the company, unless otherwise stipulated, or by its sequestration, if assignees have been excluded in the lease. The death of the grantor before the term of entry voids the lease.

Obligations and Conditions Common to all Leases

The usual conditions of the lease are, *on the part of the landlord*, that he warrants the tenant's full and undisturbed possession of the subjects during the continuance of the lease, and protection against all encroachments on his right. No obligation, however, lies upon the landlord to restore the subjects if they are destroyed by inevitable accident. In an urban lease the landlord is bound to maintain the house in a tenantable condition, and if he fail in his obligation the tenant is entitled to damages, or in some cases to abandon the lease. But if a tenant continues to inhabit a house which he believes to be, owing to the landlord's fault or negligence, dangerous to health, he cannot hold the latter responsible for any consequences which follow. *On the part of the tenant*, the usual conditions are that under the contract he acquires right to the annual fruits and to the use and possession of the subjects let, in respect of the payment of the stipulated rent. There is an implied obligation in an agricultural lease that the tenant shall stock and labour his farm according to the rules of good husbandry; that he shall regularly pay his rent; that he shall keep and leave the houses and the enclosures on the farm in good and sufficient repair; and that he shall remove himself, his family, dependents,

and goods from the subjects at the termination of the lease. As the tenant is entitled to the use of the subjects, he has a claim for diminution of the rent, or in some cases for a total discharge of his liability, if the subjects of the lease are rendered, by any cause outwith his power, unfit for the purpose for which they were let. The destruction of a part of the subject of the lease will not, however, release the tenant, unless the part be essential for the purpose for which the premises were let; and in determining the question whether the subject was either entirely or in a material part so destroyed as to make it unfit for the purposes for which it was let, a case of destruction is not made out by showing that the premises have been made uncomfortable and unsuitable for a limited time. When such a calamity as a fire, affecting both parties, has accidentally occurred, a tenant may reasonably be called on to submit to considerable inconvenience as the natural and often necessary consequence; and if the damage be such as to be accurately described as causing the tenant simply "considerable inconvenience", he is not entitled to throw up his lease, but is bound to give his landlord an opportunity to make good the damage without loss of time. In any event a tenant is not entitled to abandon the subject leased and to be freed from his obligation to pay the rent except on giving due notice to the landlord. If the failure of the subject be due to supervening legislation, the risk is with the tenant. An agricultural tenant has no right at common law, and apart from stipulation, to kill game other than hares and rabbits, as to which his rights are now defined by the Ground Game Act of 1880. Where, however, the landlord has unduly increased the game on the farm beyond a fair average stock, the tenant is entitled to damages. A tenant has no right, apart from express stipulation, to fish with rod or net on streams or ponds within his farm; nor is he entitled, without the landlord's consent, to change the use of the subject from that for which it was let. Apart from express agreement a tenant has no claim for the expense of improvements which he makes spontaneously and presumably for his own use and interest, except under the Agricultural Holdings Acts, in holdings which are purely agricultural. The taxes and public burdens imposed on the subjects are payable by the tenant, though in the case of furnished houses the practice, apart from stipulation, is that the landlord pays the whole taxes applicable. The tenant is bound to remove at the expiration of the lease, on the adoption of the appropriate procedure of warning him to remove being given by the landlord, and failing his doing so he may be ejected by warrant from the Sheriff, i.e. County Court Judge. The precise proceedings necessary are somewhat too technical for inclusion in this notice. While these are the common conditions in a lease, there may be an infinite variety of others applicable to the special circumstances of the particular lease or nature of the subjects let, which are too numerous to mention.

Special Conditions and Forms Applicable to Different Classes of Lease

The special provisions applicable to agricultural and mineral leases of lands are very numerous, and it is not possible within the compass of this article to consider them. A word may, however, be said with reference to leases of various rural subjects and to urban leases. Mills, salmon fishings, a mansion house with shootings and deer forests, all form proper subjects of a lease. In the case of mills the lease usually includes the fixed machinery, with an obligation on the tenant to keep it in good working repair during his tenancy. The tenant of salmon fishings, whether by net or rod, is limited in his rights by statute, as well as by special Acts of Parliament and the rules and by-laws of Commissioners applicable to the principal rivers of Scotland and their tributaries, and to the jurisdiction of local or district boards. These prescribe *inter alia* the annual close time, the manner of fishing which is permissible, the size of net which may be used, and the observance of the weekly interval, technically known as the "Saturday slap". In leases of shootings and deer forests, special provisions as to watching and preservation, the head of game which may be killed, and so forth, are generally inserted; while such leases usually also contain general stipulations that the tenant shall exercise his rights in a fair and sportsmanlike manner, and leave a sufficient breeding stock on the ground at the termination of his tenancy. Without special stipulation the tenant has no power to sublet. With regard to urban subjects, which include houses, shops, and manufactories, the lessee has an implied power to sublet, though the privilege does not apply to leases of furnished houses. An assignation of an urban lease must be intimated to and accepted by the landlord to enable the lessee to be relieved of his obligation. In a sublease the principal tenant remains bound, unless the landlord has agreed to relieve him and accept the sublessee in his stead. A subtenant is not bound to remove without warning. The landlord is bound to keep the drainage in order, and the house wind- and water-tight. The tenant, on the other hand, is bound to keep the interior of the subjects let in good order and repair, ordinary

wear and tear excepted. The tenant cannot remove, at the termination of the lease, any furniture or fittings which have been built into or made to form part of the structure of the building, or which cannot be removed without damaging the structure or the walls or floors.

Building and Long Leases

It is not possible within the scope of the present article to say more than a word or two in connection with such leases. Under a building or long lease the ordinary relation of landlord and tenant is materially altered, the tenant occupying the position more of a quasi-proprietor than of a tenant strictly so-called. In practice, the tenant under such a lease acquires a position closely analogous to that of an ordinary fee-simple proprietor, and by the terms of his contract he is placed under obligations similar to those imposed on a vassal under a feu contract. The lease is, as its name implies, for a lengthened period, ninety-nine years being a usual duration, and nine hundred and ninety-nine years by no means an uncommon one. The granting of such leases was not recognized by the Legislature until 1857, when the Registration of Leases (Scotland) Act was passed. By the Trusts (Scotland) Act of 1867 it was made competent for the Court of Session (the Supreme Court of Scotland), on the petition of trustees acting under any trust deed, to grant authority to such trustees to grant long leases of any part of the heritable property included in the trust estate. Provisions are also included in the Entail Acts enabling heirs-of-entail to grant long leases of the entailed lands. Provided certain statutory requirements are observed, the Registration of Leases Act above referred to enabled a tenant under a long lease to make his leasehold right a fund of credit, and to give to a creditor a valid security over the subjects leased, which should be good in a question with a singular successor of the landlord, although the right of the creditor had not been completed by actual possession of the subjects leased. This was affected by authorizing the lease to be recorded for publication in the Register of Sasines, which, subject to the limitations stated in the Act, was declared to have the effect of possession. Such leases must be probative, and the period of their endurance must not be less than thirty-one years. Except in the case of leases of mines and minerals, the extent of the land leased must be set forth, and it must not exceed 50 acres.

LANDLORD AND TENANT IN IRELAND

The relationship existing between landlord and tenant in Ireland differs fundamentally according as the subject-matter of the tenancy is or is not agricultural land. If the subject-matter of the tenancy is not agricultural land then it is on the whole true to say that in Ireland as in England the terms of the tenancy are dependent in the main on the agreement made between the parties: the rent, the length of the term, and generally the conditions of the tenancy are such as the parties themselves agree upon. But where the subject-matter of the tenancy is agricultural land, or land partly agricultural and partly pastoral in its nature, then as a general rule the terms of the tenancy are settled not by the agreement of the parties at all, but by law; the amount of the rent is fixed by a Court; the term is perpetual; the conditions are those enacted by Parliament, and the contract of the parties cannot vary them. That being so, it is necessary to treat separately of the general law of landlord and tenant and the law as applied to agricultural land.

In dealing with the law of landlord and tenant in general in Ireland, it is only here intended to point out the main points in which that law differs from the law in England.

The first and fundamental difference is a difference in the theory of the law, and though somewhat technical it has results too important to permit of its being passed over. According to English law the relationship of landlord and tenant, carrying with it the peculiar right of distress, is only created where the landlord agrees with the tenant that the tenant shall have the right to occupy land in consideration of a rent for so long a period as shall contemplate the resumption of occupation by the landlord or those deriving under him. For example, a man owning land in fee simple may let his land for five, or fifty, or five hundred years at a rent; by so doing he becomes a landlord of the land; but, however long such a term, the agreement contemplates that, when the term is ended, the landlord, or someone claiming under him, shall resume possession of the land. Again, a man who has himself a lease of a plot of land for one hundred years, paying rent therefor, may make another letting for five, or fifty, or ninety-nine years from the beginning of his own one hundred years at an increased rent, and by so doing becomes himself a landlord, and has the rights of a landlord, because there is reserved to himself or those who come after him the right to resume possession when the

term so created has ended. But in Ireland it is different, and since 1860, when what is known as Deasy's Act was passed, the relation of landlord and tenant is deemed to be founded on the express or implied contract of the parties, and a reversion is not necessary to such relation, which is deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent. A reversion not being necessary, when A lets to B land for ever at a rent, A has all the rights of a landlord by distress or otherwise; and few tenures are commoner in Ireland than a lease for ever, or fee-farm grant as it is called; and it is not unusual to find several fee-farm grants of the same piece of land superimposed one upon the other. For example, A, who holds by an original grant from the Crown, may have granted Blackacre to B for ever at a rent of £2; B may have subgranted to C at £10, also for ever; C to D for ever at £25; and so on, sometimes to six or seven fee-farm grants and subgrants; and in every case the grantor and grantee stand to one another strictly as landlord and tenant. Further, and perhaps more important, a leaseholder may in Ireland sublet for the whole of his term and so create the relationship of landlord and tenant between himself and the sublessee.

Creation of Tenancies

There are in Ireland statutory provisions similar to Section 4 of the Statute of Frauds (see p. 52) whereby an agreement concerning any interest in land must be in writing, signed by the party against whom it is to be enforced. In Ireland, however, it is further necessary that any contract of tenancy whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time, not being from year to year or any lesser period, shall be by deed executed *or* note in writing, signed by the landlord or his agent thereto lawfully authorized in writing. So that, whereas in England a lease for any period up to three years may be made by word of mouth, in Ireland if the period is greater than a year it must be by deed or by a written memorandum signed by the landlord or his authorized agent; and again, whereas in England a lease for more than three years must be by deed (see p. 52), in Ireland a lease for any term, long or short, may be made by a simple agreement signed by the landlord or his duly authorized agent.

Surrender

A surrender of any tenancy may in Ireland be made by a simple writing signed by the tenant.

Where the Tenant Overholds

In England a tenant retaining possession after the determination of his tenancy by efflux of time or notice to quit becomes a tenant at will, and can be turned out, or may leave at any time; but in Ireland, in case any tenant, or his representative, after the expiration or determination of the term agreed on in any lease or instrument *in writing*, shall continue in possession for more than one month after demand of possession by the landlord or his agent, such continuance shall, at the election of the landlord, be deemed to constitute a new tenancy from year to year, subject to the former rent and to such of the agreements contained in the lease as may be applicable to the new holding.

Assignment of Tenancies

In Ireland the interest of the tenant in any lands under any contract of tenancy must be assigned by deed *or* by an instrument in writing, signed by the party assigning; and in the case of any written contract of tenancy created since 1st June, 1826, containing a condition prohibiting assignment, it is not lawful to assign the lands or any part thereof unless the landlord or his agent authorized in writing consent and testify their consent by executing the assignment, or by endorsing their consent on the assignment. An assignment in breach of this provision is simply null and void, and even the assignor himself can take advantage of its being void. Every person, being an assignee, becomes liable for the rent and on the covenants in the lease so long as he remains such assignee; and further, if he assign over the lease to some other person in the interval between two gale days, remains liable for the rent and on the covenants up to and including the gale day next following the service of notice of the assignment upon the landlord.

An original lessee in England remains always liable on the rent and covenants; but in Ireland, where an original tenant assigns, and the consent of the landlord is given in the manner mentioned above, then the landlord so consenting releases the original tenant from all future rent and all future breaches of the agreements in the lease, but not from any already accrued rent or any already existing breaches of agreement.

Subletting

When a contract of tenancy contains no prohibition of subletting, the tenant may sublet the whole or any part of the premises; but if this con-

tract of tenancy forbids subletting, then any subletting is void unless the landlord or his agent thereto lawfully authorized testify his consent by executing the sublease or endorsing such consent on the sublease; and no receipt of rent by the landlord is deemed a waiver of any such agreement against subletting; and further, any one such consent is not a general waiver of the benefit of the agreement against subletting.

If any tenant sublet, then the head landlord, if any gale of the head rent is a month in arrear, may serve notice on the subtenant to pay to him so much of the rent due by the subtenant as will discharge the head rent in arrear; and upon such notice the subtenant becomes liable directly to the head landlord for such head rent, and payment thereof is a discharge *pro tanto* of the subrent; or, the subtenant, without any such notice, may voluntarily pay any head rent in arrear, and so be discharged *pro tanto* in respect of the subrent.

Covenants and Conditions Implied by Law

By Deasy's Act, in every written contract of tenancy made after the passing of that Act (28th August, 1860), there has been implied on the part of the landlord an agreement (1) that the landlord has good title to make such lease; and (2) that the tenant shall have quiet enjoyment of the premises so long as the tenant pays the rent and performs his agreements in the lease; and there is also implied on the part of the tenant an agreement (1) to pay rent and taxes; (2) to keep the premises in good repair; (3) to deliver up the premises in such good repair (accidents by fire without the tenant's default excepted); and these agreements are implied whether anything is said about repairs in the contract of tenancy or not. If there is a specific agreement to keep the premises in repair then the tenant must reinstate them if burnt down; but where there is a written or parol letting of a dwelling house or other building constituting the substantial matter of the letting, and such letting was not made subject to an agreement on the tenant's part to repair, then if the premises are destroyed, or become incapable of beneficial enjoyment, by accidental fire, without the tenant's default, the tenant, on paying all rent due or accruing due, may surrender the premises and be freed from the rent and covenants thenceforth.

Housing, Town-planning, &c., Act

This Act does not apply to Ireland.

Fixtures

Fixtures are in Ireland the same things as in England (see p. 57), and the general law applicable to them is the same, with a modification embodied in s. 17 of Deasy's Act, whereby it is enacted that "Personal chattels, engines and machinery, and buildings accessorial thereto, erected and affixed to the freehold by the tenant at his sole expense for any purpose of trade, manufacture, or agriculture, or for ornament, or for the domestic convenience of the tenant in his occupation of the demised premises, and so attached to the freehold that they can be removed without substantial damage to the freehold or to the fixture itself, and which shall not have been so erected or affixed in pursuance of any obligation, or in violation of any agreement in that behalf, may be removed by the tenant or his executors or administrators during the tenancy, or, when the tenancy determines by some uncertain event, and without the act or default of the tenant, within two calendar months after such determination, except so far as may be otherwise specially provided by the contract of tenancy: provided that the landlord shall be entitled to reasonable compensation for any damage occasioned to the premises by such removals." Further, in Ireland, where the tenant becomes bankrupt, unless his assignees elect to take the tenancy and do not disclaim, such assignees acquire no right to the fixtures; and should they elect to take and afterwards disclaim, then the Court has in Ireland no power to order the sale of fixtures for the benefit of the bankrupt's creditors, but such fixtures pass to the landlord with the premises.

Bankruptcy of the Tenant

See Chapter XI of this Part.

Landlord's Remedies for Rent

Landlords in Ireland can, as in England, distrain, and the law is practically the same in both countries, though the formalities differ slightly. The landlord may also sue for his rent—in the County Court if the amount sought to be recovered is £50 or under, in other cases in the High Court.

Ejectment for Non-payment of Rent

Where a year's rent falls into arrear, a landlord in Ireland has the right to bring an action for the recovery of the land itself—in the County Court where the rent is under £100 a year, and otherwise in the High Court. In such an action, after the landlord has obtained judgment, the tenant can

redeem the holding on payment within six months of all the rent in arrear; but should the holding be agricultural, then no matter how many years' rent is in arrear the tenant may redeem on payment of two years' arrears, without prejudice to the landlord's right to obtain personal judgment against him for the balance of the arrears.

Other Ejectments

The landlord in Ireland has practically the same remedies for recovering possession on the expiry of the term demised as in England, including summary proceedings at Petty Sessions in the case of small properties overheld. Where the annual valuation for rating puposes is £30 or under, or the annual rent is less than £100, the landlord may proceed in the County Court; but in other cases he must proceed in the High Court.

Notice to Quit

The law in Ireland as to notices to quit is in the main the same as in England (see p. 63), but where the holding the tenancy in which is to be determined is agricultural or pastoral, special statutory provisions have been enacted in the Notice to Quit (Ireland) Act, 1876. Of course any express provision in the contract of tenancy as to notice to quit must be followed; but where there is no such provision, and notice to quit is necessary, the periods for which such notices must be served are as follows:—

A. In the case of yearly tenancies:—

(*a*) If non-agricultural and non-pastoral, half a year's notice expiring at the end of any year of the tenancy.

(*b*) If agricultural or pastoral, then

(i) If created before 15th August, 1876, half a year's notice expiring on the last gale day of a calendar year.

(ii) If created since 15th August, 1876, one year's notice expiring on any gale day, unless the tenant has become bankrupt, and then half a year's notice expiring on any gale day is sufficient.

B. Tenancies for one year certain: no notice, unless created after 22nd August, 1881, and the holding is agricultural or pastoral, in which case there must be one year's notice expiring on any gale day.

C. Tenancies at will: no notice, except in agricultural or pastoral holdings created after 1870, in which case half-year's notice expiring on last gale day of calendar year.

A notice to quit an agricultural or pastoral holding must bear a special half-crown impressed stamp, but no other notice to quit need be stamped.

Tenancies within the Land Law (Ireland) Acts

Under an Act passed in the year 1870 a tenant of an agricultural holding in Ireland might, if turned out of his holding, obtain compensation for any improvements made by him or his predecessors in title on the holding, with a limitation of the amount laid down in that Act. This, however, failed to satisfy the tenants, who demanded what were known as the "Three F.'s", viz., Fair Rent, Free Sale, Fixity of Tenure; and in 1881 their demands were conceded by the Land Law (Ireland) Act, 1881, which has been amended and extended by many subsequent Acts. The Land Law Acts only apply to holdings which are agricultural or pastoral, or partly agricultural and partly pastoral, and only when such holdings are not demesne lands, or accommodation lands called "town parks", and are not lands let to meet a temporary necessity or convenience of the landlord or tenant. Under these Acts holdings to which they apply have been divided into two broad classes: "present tenancies", those existing at the passing of the Act of 1881, or created before 1st January, 1883, in holdings in which tenancies were subsisting at the passing of the Act; and "future tenancies", tenancies which are not present tenancies. At first there was no interference with leases, but by subsequent legislation persons holding a "present tenancy" under a lease, as well as under a tenancy from year to year, have been given the right to obtain the advantages conferred by the Act of 1881. Those advantages are as follows:—

1. *Fair Rent.*—A tenant of a present tenancy may apply to the Court of the Land Commission to have a fair rent fixed upon his holding. Upon such application the Court hears evidence by both landlord and tenant, the holding is inspected by one of the lay Commissioners, and the Court fixes a fair rent on the holding. This rent is for a term of fifteen years, and at the end of that time it may be reviewed at the instance of either landlord or tenant. The principle underlying the fixing of the amount of the fair rent is that the tenant is to pay the amount an occupying tenant working the holding with reasonable skill and industry could make out of the farm; but the tenant is not to be rented upon improvements made by himself. The rent may also be fixed by agreement, and such agreement when filed has the same effect as a fair-rent order.

2. *Fixity of Tenure.*—When a fair rent has been fixed the tenant becomes possessed of a "statutory

term", renewable every fifteen years. During that term he cannot be compelled to pay a higher rent than that fixed, and he cannot be compelled to quit his holding except in consequence of a breach of some one or more of the "statutory conditions". These are:—

(1) To pay the fair rent at the appointed times.

(2) Not to commit waste.

(3) Not to sublet or subdivide the holding without the landlord's consent.

(4) Not to do any act whereby his tenancy becomes vested in an assignee in bankruptcy.

(5) To permit the landlord, paying due compensation, to enter to quarry or mine, open roads, view waste, and exercise sporting rights.

(6) Not to open a house for the sale of intoxicating liquors without the consent of the landlord.

Certain rights to resume portion of the holding for *bona fide* building or allotment purposes are reserved to the landlord.

3. *Free Sale.* — The tenant of every holding, whether a present or future tenancy, if it is an agricultural or pastoral, or partly agricultural and partly pastoral holding, may sell his tenancy for the best price that can be got, subject to regulations of which the following are the most important:—

(1) Except with the consent of the landlord, the sale shall be to one person only.

(2) The tenant must give notice to his landlord of his intention to sell.

(3) On receipt of such notice the landlord may purchase the tenancy for such sum as may be agreed upon, or, failing agreement, as may be ascertained by the Court to be the true value thereof.

(4) On a sale to a person other than the landlord the vendor must furnish in writing to the landlord the name of the proposed purchaser and the amount of the consideration.

(5) If the tenant fail to give such information the Court may declare the sale void.

(6) The landlord may refuse on reasonable grounds to accept the purchaser as tenant, and the reasonableness of the grounds is a matter for the Court to decide.

(7) When the tenancy is subject to statutory conditions and the sale is made in consequence of proceedings by the landlord for the purpose of recovering possession by reason of the breach of any of such conditions, the landlord is to be paid out of the purchase money all arrears of rent and damages, if any, for such breach of condition.

(8) Where the improvements on the holding are the property of the landlord (a condition of things not usual in Ireland) the landlord may consent to have them sold with the tenancy to the incoming tenant, and the value to be paid to the landlord for them will be ascertained by the Court and paid out of the purchase money.

(9) The landlord must be paid all claims for arrears of rent and breaches of condition out of the purchase money when he gives timely notice of such claims to the purchaser.

Land Purchase Acts

The acquisition of the "three F's" under the Land Law Acts did not satisfy the tenants. They desired to become the proprietors of their holdings, and accordingly a system was inaugurated whereby the landlords were purchased out by the tenants, the State advancing the purchase price to the tenants at a low rate of interest and repayable by instalments over a long series of years. Provisions with this object were introduced into the earlier Land Law Acts, but were only in a small number of cases availed of by the tenants; but in 1903, by what is known as the Wyndham Act, a great step in advance was taken, and the transfer of the fee in the lands to the tenants greatly facilitated. The new principle introduced in the Wyndham Act was the free gift by the State of a percentage on the purchase price called the "bonus", to bridge the difference between what the tenants said they could afford to pay and what the landlords said they could afford to take. The Act of 1903 was amended by the Irish Land Act, 1909; and under these Acts the method adopted is shortly this:—

First of all, estates, and not holdings, are sold —that is, where a group of tenants under one landlord, comprising all the tenants on what is normally an estate, or so many of them as the Land Commission may deem to be tenants of an "estate", can agree with their landlord as to the price to be paid for their holdings, a sale may be carried through.

The agreements entered into are lodged with the Land Commission, and when the Commission approve of the sale the Land Commission advance the whole of the purchase money, which is paid to the landlord, plus the "bonus", varying in amount with the ratio the purchase price bears to the rental of the estate; if the number of years' purchase is small the bonus is larger, and *vice versa.*

When the advance is sanctioned, then the several holdings are vested in their respective purchasers by vesting order, and the purchasers become owners in fee, subject to the payment of a terminable annuity to the Land Commission. The amount of that annuity is ascertained by taking $2\frac{3}{4}$ per cent as interest on the purchase price, and adding thereto $\frac{1}{2}$ per cent as a sinking

fund for repayment of the advance, making the ordinary period for repayment about fifty years.

The fee thus vested in the tenants is of course subject to the annuity payable to the Land Commission, but it is further subject to certain conditions, the most important of which are: that the tenant's interest descends on his death not on his heir, but is distributable amongst his next-of-kin as personal estate; and the holding of the tenant cannot, so long as the annuity is a charge upon it, be mortgaged for more than ten times the value of the annuity without the consent of the Land Commission.

The ownership of all land so purchased out must be registered in the Registration of Title Office.

Town Tenants Act, 1906

The position of a tenant of premises in a town in Ireland was enormously improved by the passing of the Town Tenants (Ireland) Act, 1906. That Act deals with two things: (1) improvements made in the leased premises, (2) compensation to the tenant where the tenancy is determined capriciously by the landlord; and the two things are quite distinct, though in many cases a tenant may claim in respect of both.

Compensation for Improvements

Section 1 of the Act provides that a tenant on quitting his holding may claim compensation, to be paid by the landlord, in respect of all improvements made on the holding by the tenant or his predecessors in title which (*a*) add to the letting value of the holding, (*b*) are suitable to the character of the holding, and (*c*) have not diminished the letting value of any other property of the same landlord.

By Section 17 the provisions of the Act with regard to compensation for improvements apply only to holdings which are houses, shops, or other buildings situate in urban districts, towns, or villages, and which are occupied either for residential *or* business purposes, or partly for residential and partly for business purposes. There is in the Act no definition of the term "village", and in a disputed case the Court before whom the matter comes must decide whether the premises improved are or are not in a village.

The tenant's right to claim is subject to certain conditions:—

1. No claim at all can be made when it appears to the Court that the landlord has made an offer, which in the opinion of the Court is reasonable, of a new tenancy, or of the continuance or renewal of the old tenancy, with the right to the tenant to dispose of his interest therein, and the tenant has not accepted the offer.

2. No claim can be made in respect of any improvement, made either before or after the passing of the Act, which the landlord had undertaken to make, except in cases where the landlord has failed to perform his undertaking within the time agreed on, or, where no time has been agreed on, within a time which, in the opinion of the Court, is a reasonable time.

3. No claim can be made in respect of any improvement made, whether before or after the passing of the Act, in contravention of a contract not to make that improvement.

4. No claim can be made in respect of any improvement made in pursuance of a contract entered into for valuable consideration, including a building lease.

5. No claim can be made in respect of any improvement made before the passing of the Act (21st December, 1906), except permanent buildings, unless made within ten years before the date of such claim.

The amount to be awarded as compensation for any improvement shall in no case exceed the capitalized value of such addition to the letting value of the holding as the Court shall determine to be the direct result of such improvement; and the Court may, in reduction of the tenant's claim, take into consideration the time during which the tenant may have enjoyed the advantage of the improvements and the rent at which the holding had been held, and any benefits which the tenant may have received from his landlord in consideration expressly or impliedly of the improvements made.

The Court may, as in the case of compensation for disturbance treated of below, deduct from the amount awarded any sums claimed by the landlord for rent or breach of covenant.

A tenant cannot, since the passing of the Act, make what improvements he likes, and, when quitting, claim compensation from his landlord. A tenant proposing to make improvements in his holding must send to his landlord notice of his intention to make such improvements, with a specification and plan of the proposed improvements. The landlord then has three months within which to object or not. If he does not object, the tenant may proceed with the proposed improvements. If the landlord or his agent objects, then the tenant may apply to the Court, and the Court may sanction all or any of the improvements, making such modifications in the specification or plan as the Court thinks fit, provided the Court is satisfied that the improvement (*a*) will add to the letting value of the holding,

(*b*) and is reasonable and suitable to the character of the holding, and (*c*) will not diminish the letting value of any other property of the same landlord.

The landlord, either after the notice served by the tenant, or during the hearing, or after the decision of the Court, may undertake the improvements himself; and in that case may execute the same in a reasonable manner, and charge the tenant a sum not exceeding 5 per cent per annum on the outlay incurred in executing the improvements, or, at the election of the tenant, not exceeding such annual sum, payable for a period of twenty-five years, as will repay such outlay in the said period, with interest at 3 per cent. Any annual sum so charged is recoverable as rent.

Unless a tenant serve such notice, and unless in case of objection taken the Court sanction the improvements, the tenant cannot claim compensation. But where a tenant, upon the landlord's default, executes works required by an order of a sanitary authority, the tenant may claim in respect of such works as improvements though no notice of intention to execute them shall have been served by him.

Compensation for Disturbance

When a landlord, without good and sufficient cause, terminates, or refuses to grant a renewal of the tenancy, or it is proved that an increase of rent is demanded from the tenant as the result of improvements which have been effected at the cost of such tenant, and for which he has not, either directly or indirectly, received an equivalent from the landlord, and such demand results in the tenant quitting the holding, the tenant may claim compensation for disturbance, in addition to the compensation (if any) to which he may be entitled in respect of improvements. An agreement not to make such a claim is absolutely void. The measure of the compensation awarded is (1) the loss of goodwill, and (2) the expense incurred in connection with the removal of the tenant's goods, implements, produce, or stock.

This claim can arise only in respect of houses, shops, and other buildings occupied wholly or to a substantial extent for trade and business purposes, and only where such buildings are held—

(*a*) Under tenancies from year to year created after the passing of the Act (21st December, 1906),

(*b*) Under leases made after the passing of the Act for terms of less than thirty-one years or for a life or lives, *or*

(*c*) Under contracts of tenancy existing at the passing of the Act where the rent of the holding is under £100 per annum.

But it is to be noted that this section does not confine the claim to premises in towns or villages.

A tenant evicted for breach of any condition of his tenancy is not entitled to any compensation for disturbance, though apparently he is for improvements.

There is no definition in the Act of "good and sufficient cause". Continued non-payment of the rent except under threat of legal proceedings, bankruptcy of the tenant, or general insolvency would be such sufficient cause, but not anything affecting the landlord merely, such as his desire to alter the nature of the leased property. Again, there is no definition of "loss of goodwill", but it is taken to mean the loss a trader sustains by reason of his removal from a place to which his customers have become accustomed to resort, and will naturally vary very much according to the trade; a grocer's customers will not be so apt to follow him if he remove to a distance, as will, for instance, the customers of a druggist, and the loss of goodwill to the former will probably be greater than to the latter, though both will greatly depend on the possibility of securing other suitable premises in the immediate neighbourhood of the premises left, and upon the competition in trade in that immediate neighbourhood. The solitary druggist in a small country town, who is evicted, but is able to procure other suitable premises in the same town, may have a substantial claim in respect of costs of removal, but his claim in respect of loss of goodwill can be but small. The cost of fitting up new premises for the business is an element which cannot be taken into consideration.

Court for Hearing Claims

The tribunal appointed by the Act for deciding the validity and amount of claims for compensation is in all cases the County Court, no matter what the size of the claim, with an appeal to the Judge of Assize, or the Court of Appeal. The method of enforcing a claim is laid down in the Rules of Court framed under the Act.

[AUTHORITIES.—*Woodfall*, *Foa*, *Redman*, on "Landlord and Tenant".
Scotch: *Hunter*, "Landlord and Tenant"; *Rankine* on "Leases"; *Rankine* on "Land-ownership in Scotland"; *Green's* "Encyclopædia of Scots Law".
Irish: *Cherry*, "Irish Land Acts"; *Cherry*, *Kennedy*, *& Dawson*, "Town Tenants (Ireland) Act, 1906".]

CHAPTER X

MASTER AND SERVANT

Definition and Classification—The Contract of Employment—Servants' Rights in regard to Character and Remuneration—The Truck Acts—Shop Clubs—Factories and Workshops—Mines and Quarries—Accidents to Workmen and other Servants—Master's Responsibility for the Acts of his Servant—Third Parties and the Relation of Master and Servant—Criminal Offences by and against Servants—Apprenticeship—Trade Unions and Trade Disputes—Note on Scots Law of Master and Servant

DEFINITION AND CLASSIFICATION

The Relationship of Master and Servant Defined

In considering the respective liabilities, duties, and obligations of masters and those they employ, it frequently becomes necessary to determine whether the connection between the parties concerned is that which the law will regard as master and servant, or whether, as a matter of fact, it is not really that of principal and agent, or employer and contractor, or even that of partners. It may happen that, when such relations as those just mentioned exist, one of the parties may have the power to direct what work it is that the other is to do. When, however, the true relationship of master and servant exists the master has the further right to direct the other how the work is to be done. The mere fact, however, that another may have certain powers of direction in regard to the manner of the doing of the work does not destroy that relationship; for instance, the fact that the officers of a vessel have certain powers of control over the servants of a stevedore engaged on the vessel does not make them the servants of the shipowner rather than of the stevedore. It is a usual incident of the relationship that the master has the power of appointment and dismissal; but he may delegate the power to another servant, so that, for example, a labourer appointed by a farm bailiff is not the servant of the latter, but of the bailiff's employer. Payment by salary or wages is usual, but a person may be remunerated by a percentage on profits and still be a servant and not a partner. (See Chapter III of this Part.) A person may also be in the position of servant although allowed a certain discretion as to where and how his work is to be done, as in the case of a traveller, provided, however, he is required to give a definite amount of his time to the business. In the absence of the latter condition the person would generally be in the position of an agent rather than a servant. (See Chapter II of this Part.) The question of the degree of control and direction residing in one party is also the main factor in determining whether another person doing work for him is in the position of a contractor or simply of a workman in his employ. Control by the employer of the manner of doing the work is, in general, incompatible with the position of a contractor; but in certain cases some degree of control may exist in that relationship, as where the employer exercises supervision through an inspector.

Classification

Servants are usually classified as menial servants, servants other than menial, and apprentices.[1] Menial servants are those whose work is concerned with the household of the master and his family, and who form part of his domestic establishment. Domestic servants are indistinguishable from menials, save that the former are generally understood as working solely in the house, whereas the

[1] As to apprentices generally, see p. 96.

term menial has been held to include such servants as a head gardener and a huntsman, living in separate cottages. A governess, on the other hand, is not a menial servant, though residing in the employer's house; nor is a steward, or the housekeeper of an hotel. In various instances the term servant or workman is defined by statute for special purposes.

THE CONTRACT OF EMPLOYMENT

Its Creation

A contract of employment may be validly made verbally, but if it is of such a character that it cannot be fulfilled within a year the Statute of Frauds requires that it shall be in writing. The mere fact that the contract of hiring and service is not in reality completed in a year does not make writing necessary; the terms need only be reduced to writing when the contract, on its face, shows that it cannot be completely performed within the year, as where, on 27th May, a person was engaged for a year's service beginning on the following 30th June. A general hiring, however, that is to say, a contract of employment with no fixed term, although presumed to be for a year, need not be in writing. Municipal corporations, appointing to other than minor posts, must do so by a contract under seal; but in the case of trading companies a contract under seal is not necessary. (See Chapter IV of this Part.)

A minor's contract of service is binding unless the terms are otherwise than beneficial to him; and any person over twenty-one (unless under some special disability), including a married woman, may enter into a valid contract of employment either as employer or employed. In the case of a partnership each partner has implied authority to engage servants for the purposes of the firm's business so as to bind the firm. (See Chapter III of this Part.)

Duration

The old legal rule, that in the case of a general hiring, that is to say, where no period is fixed, it will be presumed to be for a year, may now be said to be of general application only in the case of domestic and menial servants,[1] and in their case the employment may be terminated by a calendar month's notice on either side, given at any time, or payment of a month's wages in lieu. Even in these cases the presumption may be rebutted by showing a contrary intention. In commercial and industrial life employment may be subject to very short notice, and the fact that wages are so much a week or so much a month indicates, *prima facie*, an intention in the parties that the agreement is by the week or month; but where other circumstances can be pointed to in support of a claim that the employment was for a year, that claim is not destroyed by the mere fact of wages or salary being paid at weekly, monthly, or other intervals short of a year. A custom of the trade or occupation may be invoked to determine the question of the period of notice claimable; but it is obvious that a clear understanding on the point at the outset is calculated to prevent much possible future trouble, and writing will be the essential of a business engagement. Where there is no agreement on the subject, and no custom can be shown, the servant is entitled to a period of notice that is reasonable in all the circumstances of the case, and as to this no general rules can be laid down. It has been held, for example, that for a particular editor six months was reasonable notice; for the advertising and canvassing agent of a newspaper, one month; for a particular clerk, three months.

If the employer does not observe the period of notice an action for wrongful dismissal will lie, in which the servant may recover damages, the measure of which will represent his actual loss. That amount, however, may well be less than the wages for the unexpired period of employment, where suitable and equally remunerative employment is easily obtainable.

Termination

The contract of service may be legally terminated in various ways in addition to those which are most usual, that is to say, the expiration of the agreed period of employment, due notice, or consent by both parties. Thus, the death of either master or servant puts an end to the contract, and the executors or administrators are under no liability and have no rights in regard thereto, save for wages due at the time of death, for such a contract is founded on considerations which are personal. Bankruptcy, however, does not dissolve such a contract. (See Chapter XI of this Part.) Again, incompetence in respect of the work which the servant engaged to do justifies the employer in terminating the contract, whether arising from permanent ill health, or from habitual drunkenness, or from want of

[1] For the servants so termed, see above.

the degree of skill required for the work undertaken. Furthermore, a master may dismiss the servant, without notice, for such good cause as serious dishonesty; neglect of duty, which is something more than an isolated act of negligence not seriously detrimental to the master's interests; wilful disobedience to the master's lawful orders, if other than a single or trifling occasion, or than a refusal to do work of a different kind than that contracted; for gross insolence, the degree of which, however, varies with circumstances; gross moral misconduct; or conduct prejudicial to the employer's interests. The last ground of justification for the termination of a contract of employment has been authoritatively stated by Lord Esher, M.R.:[1] "The rule of law is, that when a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has the right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him." Instances of acts incompatible with the faithful discharge of the duty so described are disclosing trade secrets, claiming to be a partner, or, in certain circumstances, heavy speculation. The same authority thus indicates the degree of gross moral misconduct which justifies dismissal: "If a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him".

On the other hand, there are circumstances which justify the servant in departing from his employment without notice—as where the employment entails risk seriously beyond that undertaken; but in the absence of justification it is open to the master to sue the servant for damages for breach of the contract of employment.

If a servant leaves without notice, or is properly dismissed without notice, no wages are payable in respect of the broken period during which he has served since the last date when his wages became due; but wages which have accrued due at the last regular period for payment, and remain unpaid, are recoverable. On leaving at the expiration of proper notice wages are payable up to the end of the service.

Injunction Against Ex-Servant

Confidential information received by a servant during his period of employment must not be used by him to the injury of his late master's interests. Such wrongful use of information may be restrained by the Court by the process of injunction. Injunctions have been granted, for instance, to restrain a clerk from using a list of his late employer's customers for the purpose of soliciting custom, and to restrain the use of trade secrets. (See also Chapter XVI of this Part.)

SERVANTS' RIGHTS IN REGARD TO CHARACTER AND REMUNERATION

As to Giving a Character

The employer is under no legal obligation to give his servant a character. If a character is given, care should be taken to see that it is fair both to the servant and to those who may employ him. A character of a servant given to a person requesting it is a privileged document, for it concerns a matter in respect of which the late employer is under a duty and in which the future employer has an interest. But if the character states facts which are untrue, which are to the servant's detriment, and in which the person giving the character did not honestly believe, it may be held that the latter was actuated by express malice. If such malice can be shown, privilege is ousted, and it is open to the servant to bring an action for libel. (See Chapter XVII of this Part.) But it is not enough, for the purposes of such an action, to show that the statements complained of were in fact untrue; if the master honestly believed them to be true, he has a defence.

Again, if an employer has taken a servant on the strength of a character which turns out to be false, and at the hands of that servant he suffers injury—robbery for example—he may bring an action for deceit and recover damages against the person who gave the false character. Such an action will only lie, however, if the person who gave the false character did so knowingly; if he had a *bona fide* belief in the statements that he made, false in fact though they were, that is a good defence.[1]

As to Remuneration

Remuneration for services is essentially the subject of agreement, and in the absence of an agree-

[1] See *Pearce v. Foster* (1886).

[1] As to false characters in their criminal aspect, see p. 96.

ment the mere fact that work has been done may raise the implication that payment was intended, with the result that reasonable remuneration for the services rendered may be recovered. The fact remains, however, that in certain cases, where work is done for a near relation, for example, it may be difficult to recover remuneration when no contract for such remuneration can be shown to exist.

Additional remuneration for extra services can only be claimed when those extra services are entirely different, either in character or in extent, from those which are the subject of the contract of service.

Salary or wages due are recoverable in the ordinary way by action; but, when the sum claimed does not exceed £10, disputes relating to wages may be determined by a court of summary jurisdiction.[1] This provision does not refer to domestic or menial servants.[2]

By the Trade Boards Act, 1909, Trade Boards are authorized, with power, under Board of Trade control, to fix minimum rates of wages in certain ill-paid trades. The Boards include representatives of both employers and workmen.

The master is bound to refund to the servant all loss or expenses incurred in carrying out his orders, unless those orders are to do something which is clearly illegal.

THE TRUCK ACTS

The Truck Act, 1831, is the basis of the law at present existing for the control of the truck system, that is to say, the system of paying wages wholly or partly in kind instead of in money. There was an amending Act in 1887, the chief provision of which was an extension of the classes of persons entitled to the protection of the Truck Acts; and the third and last of the Truck Acts, that of 1896, is mainly concerned with the control of deductions from wages on account of fines and other matters.

Wages to be Paid in Coin

The entire amount of wages payable to a workman in respect of his labour must be paid to him in current coin of the realm, and any payment to such workmen by his employer, of or in respect of any such wages, by the delivery to him of goods or otherwise than in current coin, or any contract for payment otherwise than in current coin, is illegal, null, and void, and it makes no difference that the workman, having the option of receiving goods or cash, chooses goods. Payment in bank notes, or in cheques on a neighbouring bank, are, however, legal. Workmen within the Act are all persons who, being labourers, servants in husbandry, journeymen, artificers, handicraftsmen, miners, or otherwise engaged in manual labour, whether under the age of twenty-one or above, work for an employer under a contract of service or a contract personally to execute any work or labour. Domestics or menial servants are expressly excluded from the Acts, and it has been held that omnibus conductors, tramcar drivers, goods guards, grocers' assistants, hairdressers, and potmen living on the premises are also outside their scope. On the other hand, a motor-omnibus driver who does necessary repairs to his omnibus has been held to be within the definition of "workman". Persons who make at their own homes, or otherwise, without any person working under them except members of their own families, articles under the value of £5, knitted or otherwise manufactured of wool, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk, or of any combination thereof, or made or prepared of bone, thread, silk, or lace, are also specially brought within the protection of the Truck Acts.

To be within the Act a contract must be for the workman's own personal labour; it is not enough if he simply contracts to get work done. But the mere fact that he has others working under him does not exclude him from the Acts, provided he is also bound to work himself. Any stipulation in a contract as to the place or manner of spending the wages due to any workman is also illegal, null, and void; and employers are forbidden to make it a condition of employment that the workman's wages should be spent in any particular manner or place, or to dismiss any workman on account of the place or manner of spending his wages.

A workman is entitled to recover from his employer any wages not paid in coin; and, on the other hand, no employer is entitled to sue the workman in respect of goods supplied by or on account of the employer in respect of wages due, nor may any such claim be raised by way of set-off or counterclaim in proceedings by the workman against the employer for the recovery of wages.

Employers, or their agents, contravening the foregoing provisions render themselves liable to substantial fines. If an offence has been com-

[1] See Employers and Workmen Act, 1875, s 4

[2] The "workmen" to whom this provision is applicable are those included in the Employers' Liability Act, 1880, but excluding railway servants (see p. 89).

mitted without the employer's knowledge, he may escape the penalty if he brings about the conviction of the real offender.

Lawful Deductions

Provided they are made in pursuance of a contract in writing and signed by the workman, certain deductions from wages or contracts therefor are lawful, namely, for medicine or medical attendance, including periodical subscriptions to medical clubs; fuel; materials, tools or implements sold to miners for the purpose of their occupation; provender for any beast of burden employed in the workman's trade or occupation; house rent; victuals prepared under the employer's roof and there consumed by the workman; money advanced for any of these purposes or for the education of the workman's children. There may also be deductions for sharpening or repairing tools, provided they are by agreement not forming part of the condition of hiring; and a contract with a servant in husbandry for giving him food, non-intoxicating drink, a cottage, or other allowances or privileges in addition to money wages, is perfectly legal. It has also been held that deductions from gross or nominal wages really made for the purpose of ascertaining the net or real wages, as in respect of standing room, gas, firing, or steam power, or other things or services supplied by the employer to the workman for the purpose of the latter's trade, are not infringements of the Truck Acts. Deductions in respect of fines, bad work or injury to materials, or the use or supply of materials, tools, machines, standing room, light or heat, or other things done or provided by the employer in relation to the work of the workman, may also be made, subject to the conditions that the deductions shall be in pursuance of a contract, either written and signed by the workman, or contained in a permanent and conspicuous notice; that written particulars of the acts, omissions, or things in respect of which the deduction is made are supplied to the workman on each occasion; and that the amount deducted is fair and reasonable. Fines (of which a register must be kept) must be in respect of some act or omission which causes or is likely to cause damage or loss to the employer or hindrance to his business; deductions for bad work or injury to materials must not exceed the actual or estimated damage or loss; deductions for materials and tools must not exceed the actual or estimated cost, and those in respect of machinery, light, heat, or other services, a fair and reasonable rent or charge. The employer making deductions contrary to these provisions is liable to a penalty, and the workman may recover wrongful deductions.

There is a special Act for the protection of workmen in the hosiery trade, namely, the Hosiery Manufacture (Wages) Act, 1874. It requires all wages to be paid in coin, prohibits deductions or stoppages or contracts therefor, save for bad and disputed workmanship, and makes contracts for frame rents and charges between employer and employed illegal, null, and void. There is, however, nothing to prevent the recovery by suit by the master of a debt due to him from the workman.

SHOP CLUBS

It is an offence punishable by a fine under the Shop Clubs Act, 1902, for an employer to make it a condition of employment that any workman shall discontinue his membership of any friendly society registered under the Friendly Societies Act, 1896, or that any workman shall not join any friendly society other than the shop club or thrift fund, or that any workman shall join a shop club or thrift fund which is not registered under the Friendly Societies Act, 1896, and certified by the Registrar of Friendly Societies as satisfying the conditions laid down in the Shop Clubs Act, 1902. Where a workman is, by the conditions of his employment, a member of a shop club, he is to have the option, on leaving his employment, unless contrary to the club rules, whether certified by the Registrar of Friendly Societies or not, of remaining a member of the shop club or of taking out the share of the funds of the club due to him at the time.

FACTORIES AND WORKSHOPS

The Factory Acts

The law relating to factories and workshops was consolidated in the Factory and Workshop Act, 1901. There was an amending Act in 1907, which was concerned with laundries and charitable institutions, and these two statutes constitute the Factory and Workshop Acts of the present time.

Places within the Acts

The places to which the Acts apply are strictly

defined, and are grouped under the general headings of "factories" and "workshops". The broad distinction between a factory and a workshop is that if mechanical power is used for the purpose of the manufacturing process there carried on the place is a factory, but if no such power is used the place is a workshop. The factories, again, which are within the scope of the Act are divided into two categories, namely, textile and non-textile factories. Textile factories are premises where, mechanical power being used, manufacturing processes are carried on in connection with cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, with the exception of print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works and hat works. Non textile factories within the Acts are the following: Print works, bleaching and dyeing works, earthenware works, lucifer-match works, percussion-cap works, cartridge works. paper-staining works, fustian-cutting works, blast furnaces, copper mills, iron mills, foundries, metal and indiarubber works, paper mills, glass works, tobacco factories, letter-press-printing works, bookbinding works, flax scutch mills, and electrical stations; also, provided mechanical power is used, hat works, rope works, bakehouses, lace warehouses, shipbuilding yards, quarries, pit-banks, dry-cleaning, carpet-beating and bottle-washing works; together with laundries carried on as commercial undertakings, and any premises where manual labour is exercised by way of trade or for purposes of gain in the making, altering, repairing, ornamenting, finishing, or adapting for sale of any article. Those premises which are within the above category of non-textile factories for the reason that mechanical power is used, are within the category of workshops if such power is not used, provided that in the case of premises used for the making, altering, repairing, ornamenting, finishing or adapting for sale of any article, the employer has the right of access or control.

Certain of the provisions of the Acts are applied for the benefit of all the workers in the factory or workshop; others exclude men from their scope, and only refer to women, young persons, and children. The expression "woman" applies to a woman of eighteen years of age and upwards; a "young person" is a person who has ceased to be a child and is under eighteen; while a "child" is a person under fourteen, and who has not, being of the age of thirteen, obtained an educational certificate entitling him to be a "young person". Provisions, the application of which is limited, will be indicated when herein dealt with. Furthermore, the Secretary of State is empowered to extend or modify, by special order, numerous provisions of the Acts, and in frequent instances this power has been used by the Home Office.

Provisions as to Health and Safety

Provisions which apply generally are those relating to health and safety. Factories and workshops must not be overcrowded; that is to say, there must be 250, or, during overtime, 400 cu. ft. of space for each person employed at any one time; they must be adequately ventilated and kept free from effluvia arising from drains and other nuisances; the temperature therein must be maintained at a reasonable degree, and, where necessary, the floors thereof must be adequately drained; and they must be kept in a cleanly state by washing, painting, varnishing, or lime-washing. Suitable and sufficient sanitary accommodation must also be provided, regard being had to the numbers and the sex of the persons employed.

In a factory the following requirements for securing safety must be observed. Every hoist or teagle and every fly-wheel directly connected with mechanical power, and every part of any water wheel or engine worked by such power, must be securely fenced. Every wheel race not otherwise secured must be securely fenced close to its edge. In these cases it makes no difference that the machinery may not be dangerous without fencing. All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced or be as safe as if it were so fenced, and this provision applies even though the machinery in question may only be dangerous when there is carelessness. The fencing should be of the kind known to be most efficient at the time. In factories erected since 1st January, 1896, the traversing carriage of any self-acting machine must not run out within 18 in. of any fixed structure not part of the machine, if the space over which it runs is one over which any person is liable to pass; but in the case of cotton or woollen spinning machines the traversing carriage is allowed to run out within 12 in. of the headstock of another such machine. The occupier and his servants or agents must not permit a person employed in a factory to be in the space between the fixed and traversing parts of a self-acting machine unless the machine is stopped with the traversing part on the outward run; and no woman, young person, or child is allowed to work between the fixed and traversing part of any self-acting machine in motion by the action of mechanical power. A child must not be allowed to clean any part of any

machinery in a factory, or any place under any machinery except overhead mill gearing, nor a young person any dangerous part of any machinery, while the machinery is in motion by the aid of mechanical power. A woman or young person must not clean any mill gearing connected with machinery in motion. The prohibition extends to fixed as well as moving parts of the machinery. All steam boilers in factories and workshops must be fitted with a proper safety valve, steam gauge and water gauge, and be examined by a competent person at least once in fourteen months.

The requirements as to means of escape from fire in factories and workshops vary according as the construction of factories was commenced before or after 1st January, 1892, and the construction of workshops before or after 1st January, 1896, and are only applicable to factories and workshops in which more than forty persons are employed. In the case of the former it is the duty of the local authority to ascertain whether reasonable means of escape from fire are provided, and, if such is not the case, to require the owner to take steps for making such provision. The owner may apply to the County Court for an order requiring the occupier of the factory or workshop to contribute to the cost of complying with such requirement. Factories and workshops of the later date of construction must be certified by the local authority as being equipped with reasonable means of escape from fire.

Doors must not be so fastened as not to be easily opened from the inside, and in the case of factories and workshops not commenced before 1st January, 1896, the doors of rooms in which more than ten persons are employed must, except in the case of sliding doors, open outwards.

A Court of Summary Jurisdiction is empowered to make orders prohibiting the use of machinery, plant, or premises which are dangerous to life or limb, either altogether or until duly repaired or altered.

Dangerous and Unhealthy Industries

The Secretary of State is empowered to certify as dangerous or injurious to health, life, or limb, any "manufacture, machinery, plant, process, or description of manual labour, used in factories or workshops", and to make regulations in regard thereto. Notice of intention to make such regulations must be given so that objections may be made and considered. Such regulations can only apply to employees; they have no concern with other parties who may be in the factory or workshop. A large number of processes have been certified as dangerous trades, and regulations relating thereto made accordingly. Special rules made under the earlier Factory Acts also remain in force in several instances until superseded by regulations.

There are also the following general statutory provisions relative to dangerous and unhealthy industries. Medical practitioners must notify to the Home Office and the local factory inspector and certifying surgeon, any case of lead, phosphorus, arsenical, or mercurial poisoning or anthrax contracted in any factory or workshop, and to which they are called. In factories or workshops where lead, arsenic, or any other poisonous substance is used, suitable washing conveniences must be provided for persons employed; and provision must be made for enabling meals to be taken elsewhere than in rooms where dust or fumes arise from such poisonous substances. The factory inspector may direct the provision of ventilating fans or other appliances in factories or workshops where grinding, glazing, or polishing on a wheel or any process is carried on by which dust or other impurity is generated and inhaled by the workers to such an extent as to make it, in the ordinary course, injurious to health. Women, young persons, or children must not be employed where wet spinning is carried on, unless adequately protected from wet and steam. Nor may they be allowed to have meals, or to remain during meal-times, in certain specified parts of glass works, lucifer-match works, and earthenware works. Young persons or children must not be employed in any part of a factory or workshop where the silvering of mirrors by the mercurial process, or the making of white lead, is carried on, nor children or female young persons in any part of a factory where the melting or annealing of glass is carried on. A girl under sixteen must not be employed where the making or finishing of salt or bricks or tiles (other than ornamental tiles) is carried on, and a child must not be employed in any part of a factory or workshop where is carried on any dry grinding in the metal trade, or the dipping of lucifer matches.

Fitness for Employment

A child under the age of twelve must not be employed in a factory or workshop. A young person under the age of sixteen, or a child, must not be employed in a factory for more than seven, or, if the certifying surgeon resides more than three miles from the factory, thirteen work days, unless the occupier of the factory has obtained a certificate of the fitness of the young person or child for such employment. A woman or girl

must not be employed in a factory or workshop within four weeks after childbirth.

Hours

Rules are strictly laid down as to the hours of employment of women, young persons, and children. They must not be employed on Sunday in a factory or workshop. In textile factories and in print works or bleaching and dyeing works the hours of women and young persons are 6 a.m. to 6 p.m., or 7 a.m. to 7 p.m., except on Saturdays, when they are 6 a.m. to 11·30 a.m., noon, or 12·30 p.m., or 7 a.m. to 12·30 p.m., or 1 p.m., according to the time allowed for meals and the nature of the employment. Children are only to be employed on the system of morning or afternoon sets, or on alternate days. For meals there must be allowed two hours, and on Saturdays half an hour; and continuous employment without an interval for meals is not to extend beyond four and a half hours, or, in the case of print works or bleaching and dyeing works, five hours.

In non-textile factories (except print works and bleaching and dyeing works) the hours of women and young persons are 6 a.m. to 6 p.m., or 7 a.m. to 7 p.m., or 8 a.m. to 8 p.m., but on Saturdays the employment is to end at 2 p.m., 3 p.m., or 4 p.m. respectively. For meals there is to be allowed one and a half hours, and on Saturdays half an hour. Children are only to be employed on the morning or afternoon set systems, or (where two hours are allowed for meals) on the alternate day system, and for meals they must be allowed two hours, and on Saturdays half an hour. Continuous employment must not extend beyond five hours without an interval for meals.

All women, young persons, and children employed in a factory or workshop are to have simultaneous meal-times, and they must not, during such meal-times, be employed in the factory or workshop, or allowed to remain in a room where a manufacturing process or handicraft is being carried on.

Certain exceptions to these general rules are permitted.[1] Overtime may be worked to a specified extent, and subject to certain conditions, by women employed in certain specified factories and workshops where material is liable to be spoiled by weather, where press of water arises at certain recurring seasons, where there is liability to sudden press of orders, or where persons are employed solely in polishing, cleaning, wrapping, or packing up goods; also where is carried on the process of making preserves from fruit, or curing fish, or making condensed milk; and in laundries. Women, young persons, and children may similarly work overtime in certain factories and workshops where the process on which they are employed is in an incomplete state at the end of the normal period of employment; and women or young persons employed in Turkey-red dyeing or open-air bleaching.

Male young persons may, subject to certain conditions, be employed during the night in blast furnaces, iron mills, letterpress-printing works, paper mills, glass works, and where newspapers are printed.

Other exceptions are made in the case of lace, elastic, ribbon, or trimming manufactories, bakehouses, blast furnaces, iron mills, paper mills, glass works, letterpress-printing works, print works, bleaching or dyeing works, fish or fruit preserving, creameries, Turkey-red dyeing, and Jewish factories or workshops.

Particulars of Work and Wages

In textile factories the occupier is required to furnish, in the manner specified,[1] particulars of the rate of wages and of the work to which that rate applies, so that each pieceworker may compute the wages payable to him. It is an offence to disclose or procure the disclosure of such particulars for the purpose of divulging a trade secret.

Special Application of Provisions to Docks, &c.

The foregoing provisions as to regulations for dangerous trades, and powers to make orders as to dangerous machines apply to docks, wharves, quays, and warehouses; to buildings in process of construction, with the aid of mechanical power; and to railway lines or sidings used in connection with a factory or workshop, but not for public traffic.

Cases where General Rules are Modified

In the case of men's workshops, that is to say, workshops conducted on the system of not employing any woman, young person, or child therein, the following provisions do not apply, namely, those relating to temperature, ventilation, drainage, sanitary conveniences, opening of doors, orders as to dangerous machinery, the requirements as to fans, lavatories, and meals in dangerous and unhealthy industries, and the furnishing of particulars of work and wages. In the case of women's

[1] See Factory and Workshop Act, 1901, ss. 36–56.

[1] See Factory and Workshop Act, 1901, s. 116.

workshops, that is to say, workshops where neither young persons nor children are employed, the period of employment for women may be a specified period of twelve hours, between 6 a.m. and 10 p.m., and of eight hours on Saturday.

In regard to cotton-cloth and other textile factories where atmospheric humidity is artificially produced, there are elaborate provisions[1] for the control of the moisture in the atmosphere and the temperature of the factory, also as to the supply of water, ventilation, the supply of cloak rooms, and the whitewashing of the outside of the roof.

There are also detailed provisions respecting the sanitary condition of bakehouses[2] and the ventilation and drainage of laundries,[3] also in regard to the places where and the conditions under which home work is carried out.[4]

Penalties

For employing persons contrary to the provisions of the Factory and Workshop Acts, the occupier of the factory or workshop is liable to a fine. A similar punishment is prescribed if a factory or workshop is not kept in conformity with the Acts. In the case of tenement factories, that is to say, factories where mechanical power is supplied from a common source to different parts of the same building occupied by different persons in such manner that those parts constitute in law separate factories, the responsibility for the observance of the various provisions of the Acts is placed upon the owner instead of the occupier. In certain circumstances the occupier may escape the penalty of a contravention of the Acts by bringing the actual offender before the Court.

MINES AND QUARRIES

Coal Mines, &c.

The provisions of the Coal Mines Regulation Act, 1887, apply to mines of coal, stratified ironstone, shale, and fireclay.

Employment of Boys, Girls, and Women

In such mines the employment underground of boys under the age of thirteen[5] years and of girls or women of any age is prohibited. A boy under the age of sixteen is not to be employed below ground for more than fifty-four hours in any one week, nor more than ten hours in any one day; and he must be allowed an interval of not less than eight hours between the period of employment on Friday and that on the following Saturday, and in other cases of not less than twelve hours between the periods of employment. Such periods of employment begin and end at the time of leaving and returning to the surface.

No boy or girl under the age of twelve may be employed above-ground in connection with a mine; and no boy or girl under thirteen may be so employed for more than six days a week, or (if employed for more than three days in any one week) for more than six hours in any one day, or more than ten hours in any one day in any other case. No boy or girl above thirteen and under sixteen and no woman may be so employed for more than fifty-four hours in any one week, or ten hours in any one day. No boy under sixteen, girl, or woman may be so employed between 9 p.m. and 5 a.m., nor on Sunday, nor after 2 p.m. on Saturday. Intervals between periods of employment are to be as above-stated in respect of work underground, and there is to be allowed an interval of half an hour for a meal after continuous employment for five hours. No boy under sixteen, girl, or woman may be employed in moving railway wagons. A register is to be kept of all boys, girls, and women employed.

Wages

Wages are not to be paid at or in any public-house or other place of entertainment. When the wages are paid according to the amount of mineral gotten, payment is to be made according to the actual weight gotten of the mineral, as shown at a place to be appointed for weighing as near the pit mouth as is reasonably practicable. Deductions may be made by agreement in respect of stones or substances other than the mineral contracted to be gotten sent out of the mine with such mineral, but it has been held that this provision does not justify deductions for small coal found in the large coal which was the mineral contracted to be gotten. Deductions are similarly allowed in respect of any tubs, baskets, or hutches improperly filled. No other deductions may be made, and sums improperly deducted may be recovered by the miner in an action. Provision is made in the Act authorizing the appointment of check-weighers by the

[1] See Factory and Workshop Act, 1901, ss. 90-96.
[2] See Factory and Workshop Act, 1901, ss. 97-102.
[3] See Factory and Workshop Act, 1907.
[4] See Factory and Workshop Act, 1901, ss. 107-110
[5] See Mines (Prohibition of Child Labour Underground) Act, 1900.

persons employed, and elaborate provisions are laid down for the regulation of the working of mines. Penalties are prescribed for contravening the provisions of the Act.

Amending Acts

There have been various Acts amending the principal Act of 1887, namely, the Coal Mines (Check Weigher) Act, 1894, prescribing penalties for interference with a check-weigher; the Coal Mines Regulation Act, 1896, amending various details of the principal Act; the Coal Mines Regulation Act, 1887, Amendment Act, 1903; the Coal Mines (Weighing of Minerals) Act, 1905, which again relates to check-weighers; and the Coal Mines Regulation Act, 1908, which restricts to eight hours a day the time during which persons employed in mines within the 1887 Act, except officials, mechanics, horsekeepers, or persons engaged solely in surveying or measuring may be below ground for purposes of work. In the case of firemen, examiners, deputies, onsetters, pumpminders, tanmen, or furnacemen, the maximum period is nine hours and a half.

For the Coal Mines Act, 1911, and the Coal Mines (Minimum Wage) Act, 1912, see pp. 230–1.

Metalliferous Mines, &c.

The Metalliferous Mines Regulation Act, 1872, applies to all mines other than those to which the Coal Mines Regulation Act, 1887, applies, and includes in its scope slate quarries with underground workings.

The rules as to the hours of employment of boys, girls, and women underground are the same as those applicable to coal mines, &c., and it is similarly forbidden to pay wages in public-houses.

Amending Acts are the Metalliferous Mines Regulation Act, 1875 (relating to returns), and the Slate Mines (Gunpowder) Act, 1882.

Quarries

By the Quarries Act, 1894, many of the provisions of the Metalliferous Mines Regulation Act, 1872, including those prohibiting the payment of wages in public-houses, but not those relating to hours of employment, are applied to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than 20 feet deep. A heap of deposited furnace slag is not a mineral within the provisions, but places whence are taken gravel and sand are quarries within the Act.

ACCIDENTS TO WORKMEN AND OTHER SERVANTS

Notice of Accidents

Where, in or about any mine,[1] any accident occurs causing loss of life to any person there employed, or causing any fracture of the head or of any limb, or any dislocation of a limb, or any other serious personal injury to any such person; or caused by any explosion of gas or coal dust or any explosive, or by electricity, overwinding, or any other special cause specified by Home Office Order and resulting in any personal injury whatever to any person employed in or about the mine; the owner, agent, or manager of the mine is required to send forthwith written notice of the accident, and of any loss of life or personal injury caused thereby, to the district inspector. Where any personal injury of which notice is required to be given, as above, results in the death of the person injured, written notice of the death must be sent, within twenty-four hours after such death is known to the owner or agent, to the inspector of the district. The same provisions apply to lines or sidings used in connection with a mine or quarry, and to quarries[2] of slate, stone, coprolites, or other minerals (including gravel and sand) which are in any part more than 20 feet deep. Particulars of all accidents causing disablement for more than seven days must be included in the annual returns to be sent to the inspector for the district.

Where there occurs in any of the following employments, namely,[3] the construction, use, working, or repair of any railway, tramroad, tramway, canal, bridge, tunnel, or other work authorized by any local or personal Act, or the use or working of any traction engine or other engine or machine worked by steam in the open air, or such other employment as the Board of Trade may direct, any accident which causes to any person employed therein either loss of life or such bodily injury as to cause him to be absent throughout at least one whole day from his ordinary work, his employer must, as soon as possible, and in case of an accident not resulting in death, not later than six days after the accident, send to the Board of Trade written notice of the accident, with full particulars thereof. Noncompliance is punishable by a fine.

[1] See Metalliferous Mines Act, 1872, s. 11; Coal Mines Regulation Act, 1887, s. 35; and Notice of Accidents Act, 1906.

[2] See Quarries Act, 1894.

[3] See Notice of Accidents Acts, 1894 and 1906.

In the case of factories or workshops (other than domestic factories or workshops); docks, wharves, quays, or warehouses; buildings under construction or (if over 30 feet in height) in which more than twenty persons (other than domestic servants) are employed for wages; and lines or sidings used in connection with a factory or workshop, written notice must forthwith be sent to the inspector when accidents occur therein, either (*a*) causing loss of life to a person there employed; or (*b*) due to any machinery moved by mechanical power, or to molten metal, hot liquid, explosion, escape of gas or steam, or to electricity, and so disabling any person there employed as to cause him to be absent for at least one whole day from his ordinary work; or (*c*) due to other special cause specified by Home Office Order; or (*d*) disabling for more than seven days a person there employed from working at his ordinary work. In the case of accidents included in (*a*) and (*b*), similar notice must also be sent to the certifying surgeon of the district. If, after notification of any accident causing disablement, death occurs, notice thereof must be sent to the inspector as soon as the death comes to the knowledge of the occupier of the factory or workshop. If the occupier is not the actual employer of the person killed or injured, the actual employer must immediately report the accident to the occupier.

When any boiler explosion occurs, notice thereof must be sent within twenty-four hours to the Board of Trade by the owner or user, or the person acting on their behalf.[1] This provision does not apply to boilers used exclusively for domestic purposes.

Liability of Employer at Common Law for Injury to Workman

For injuries suffered by his workmen in the course of their employment, the master may be held liable either under the Common Law rules relating to negligence (negligence, in the legal sense, being the omission to do something which the ordinary reasonable man would do, or the doing something which a prudent and reasonable man would not do; see further, Chapter XXII of this Part), or under the Employers' Liability Act, 1880, or in accordance with the provisions of the Workmen's Compensation Act, 1906.

If injury is caused to a workman by reason of a danger of which the master was aware, or ought to have been aware, or by reason of any personal negligence on the part of such master, the latter is liable to the workman in damages for the injury sustained. Such injury may be sustained and such liability incurred by the provision of defective machinery or appliances, or by a defective system of using machinery or appliances themselves quite proper, or by the failure to supply the plant or appliances reasonably necessary for the safety of persons employed. It is the employer's duty to provide machinery and appliances reasonably fit and safe for his work, and to see that such machinery and appliances are adequately supervised to ensure their being in a fit condition for working. A similar duty is imposed upon the employer to use reasonable care to prevent injury to persons in his employ through defective premises, or through any unusual danger of which he has or ought to have knowledge.

But the employer will escape liability under the rules of Common Law if he can show that the injury of which the workman complains would have been avoided had the latter himself exercised reasonable care, and that no care or vigilance was wanting on the master's own part to avert the consequences of such contributory negligence on the part of the workman. It is also a good defence if the employer can show that the workman was aware of and appreciated the danger, and freely and voluntarily accepted the risk. The mere fact, however, that the workman, knowing the danger, yet continued his work under fear of dismissal if he refused, does not exonerate the master from liability. If the employer has failed to take precautions against danger to his workpeople which are prescribed by statute, such, for example, as the fencing of machinery in accordance with the Factory and Workshop Acts, the difficulty of establishing this defence of *volenti non fit injuria* is considerably increased.

It is also a good defence to show that the injury to the workman was caused by the negligence of a fellow workman in the course of their common employment under a common master, even if that fellow workman was a foreman or other person whom the injured workman was bound to obey. Instances are injury to a miner caused by the negligence of the engineman who draws him to the surface in the cage, or to a workman through the fall of scaffolding negligently constructed under the superintendence of a foreman in the same employment. "Common employment" does not mean identical work or similar acts. The relationship rather arises from common risk, but it is not always easy to say whether or not workmen are fellow servants engaged in a common employment. Thus, a miner and the underlooker or a workman and a certificated manager of a colliery, or the seaman and the master of the vessel, are fellow servants, making, consequently, common employment a possible defence for the employer in the event of injury being caused to one by the

[1] See Boiler Explosions Acts, 1882 and 1890.

negligence of the other. Not so, however, in the case of sailors employed by the same owner but on different vessels. The employer is not exonerated from liability if he knowingly employs incompetent workmen, or if he fails to exercise proper care in their selection; nor will he find the doctrine of common employment of any avail if he has been guilty of the breach of a statutory duty which is absolute.

Care must be taken to distinguish between servants of a person employing a contractor and servants of the contractor who is employed, as between the two classes of servants the doctrine of common employment does not apply.

If a person volunteers to assist the servants of another, not being himself a servant of their employer, and by reason of the negligence of one of those servants the volunteer is injured, he is in the same position, with reference to the doctrine of common employment, as if he were actually a fellow servant.

In addition to the defences of contributory negligence, voluntary taking of risk, and common employment, it is open to the employer to show that the servant who caused the injury was not at the time acting within the scope of his employment; or that there was no negligence (as when injury is caused by a pure accident or latent defect in machinery not discoverable by ordinary care, skill, and foresight); or that the person injured was a mere licensee or trespasser.

Under the old Common Law rule no action could be brought for negligence in respect of an injury resulting in death; the right of bringing the action died with the person entitled to bring it. The Fatal Accidents Act, 1846, commonly known as Lord Campbell's Act, made certain exceptions to this rule in favour of the wife, husband, parent, or child of a deceased person; and it is provided by the Fatal Accidents (Damages) Act, 1908, that in assessing damages in any action under Lord Campbell's Act, there shall not be taken into account any sum paid or payable on the death of the deceased under any insurance.

Liability under Employers' Liability Act, 1880

The Employers' Liability Act, 1880, abolishes the doctrine of common employment in respect of particular classes of workmen and particular classes of accidents. Workmen may contract out of the Act. Workmen within the scope of the Act are persons who are labourers, servants in husbandry, journeymen, artificers, handicraftsmen, or miners, or are otherwise similarly engaged in manual labour, and whether over or under twenty-one years of age. Railway servants are also within the Act. Seamen and domestic or menial servants are outside the Act. Omnibus conductors, tramcar drivers, shop assistants, and goods guards are other instances of persons to whom the Act has been held not to apply. Motor-omnibus drivers, on the other hand, are within the scope of the Act. The real test is whether the work on which the person is engaged is principally manual labour. If manual labour is merely subsidiary to the main employment, the Act does not apply. Persons who are really contractors for work to be done are to be distinguished from those who are workmen within the scope of the statute.

For the injured person to be within the benefits of the Act, his injury must be the result of one of five causes, namely—

(*a*) Any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, provided that such defect arose from or had not been discovered or remedied owing to the negligence of the employer, or of some person in his service, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition. The term "plant" here includes any goods or chattels, fixed or moveable, alive or dead, kept for permanent use in the business, and accordingly a horse may be plant within this provision, and its viciousness a "defect in the condition" of the plant. Unfenced machinery has frequently been held to be defective in condition. Further, there may be a defect in the condition of plant if plant, sound in itself, is used for a purpose for which it is unsuitable.

(*b*) The negligence of any person in the service of the employer, whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour, whilst in the exercise of the superintendence entrusted to him.

(*c*) The negligence of any person in the employer's service to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from such conformation. For this provision to apply it is not necessary that the order or direction should in itself have been negligent. The negligence need not be directly connected with the order or direction.

(*d*) The act or omission of any person in the employer's service, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the employer's authority in that behalf, provided the injury resulted from some impropriety or defect in such rules, by-laws, or instructions. A rule or by-law approved by a

Government Department will not be deemed improper or defective.

(*e*) The negligence of any person in the employer's service who has charge or control of any signal points, locomotive engine, or train upon a railway. The term "railway" in this connection is not confined to railways belonging to or used by railway companies. A steam crane running on rails is not a locomotive engine within the provision.

If, however, the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give information thereof to the employer or some superior in the same service, he will (unless he was aware that the employer or superior already knew of the defect or negligence) be deprived of the benefit of the Act.

Actions under the Act are brought in the County Court, but may be removed into a superior Court. The action must be commenced within six months from the date of the accident causing the injury, or, in case of death, within twelve months from the time of death. Written notice of the accident, giving name and address, cause and date, must be given to the employer within six weeks.

The defences open to the employer in a Common Law action for negligence are, with the exception of common employment, also available in an action for compensation under the Employers' Liability Act.

The maximum amount of compensation recoverable is a sum equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade in the like employment in the district in which the injured workman was employed.

Liability under the Workmen's Compensation Act

Under the Workmen's Compensation Act, 1906, the employer is exposed to liabilities for accidents to his workmen from which he cannot escape in the manner open to him in respect of actions for negligence at Common Law or proceedings under the Employers' Liability Act, 1880. The liability under the Act exists independently of any negligence in the employer or his agents. Also, whereas in the earlier forms of proceedings a successful claimant is awarded a lump sum, under the Workmen's Compensation Act the compensation takes the form of a weekly payment, a lump sum only being recoverable when the accident results in death. The acceptance of compensation under the Workmen's Compensation Act bars the right of the workman (except sometimes in the case of minors) to bring an action for damages in respect of the same injury.

The power to contract out of the Workmen's Compensation Act is strictly limited. It is only permissible where it can be shown that the workman enjoys advantages under some other scheme of compensation, benefit, or insurance duly certified by the Registrar of Friendly Societies to be not less favourable to the workman than the provisions of the Act itself.

In determining whether a claim for compensation under the Workmen's Compensation Act is maintainable, the following questions have to be considered:—

(*a*) Is the injured person a "workman" to whom the Act is applicable, or is he outside its scope?

The Act defines the term "workman", that is to say, the persons within the scope of the Act, to mean "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing". The real test for ascertaining whether there is a contract of service, and for distinguishing, for example, a workman from a contractor, is whether the employer retains the power of controlling the way in which the work is to be carried out. Where the employer only indicates to another what work is to be done, that other is not, in general, in the position of a servant. Seamen are specially included in the Act.

The definition is a wide one, and has been held to include, not only persons who are "workmen" in the popular sense of the term, but also, for example, professional football players. On the other hand, it has been held that there is no contract of service in such a relation as that existing between a dispensing doctor and the guardians of the district, or a taxi-cab driver and the cab company. Certain classes of persons are expressly excluded from the Act, namely, members of the military, naval, or police forces, outworkers, members of the employer's family living in his house, persons receiving remuneration exceeding £250 a year, unless employed by way of manual labour, and persons casually employed for purposes other than those of the employer's trade or business. In determining whether or not a person is barred by the £250 limit, it is to be noted that it is "remuneration" and not "salary" that is referred to. Board, lodging, or any allowance constituting part of the consideration given for the services of the servant or workman are to be regarded as part of the remuneration. An instance of the sort of

MAKERS OF MODERN BUSINESS—IV

SIR ROBERT HART, BART. (1835–1911); born in County Armagh; entered consular service, 1854; entered Chinese Imperial Maritime Customs, 1859; Inspector-General of Chinese Customs, 1863–1908; K.C.M.G., 1882; G.C.M.G., 1889; Baronet, 1893.

FRANCIS W. HIRST; born at Huddersfield in 1873; classical honours at Oxford, 1896; barrister-at-law, 1899; editor of *The Economist* since 1907; author of "The Stock Exchange" (1911) and other works.

SIR ISAAC HOLDEN, BART. (1807–97); born near Glasgow of poor parents; employed in a worsted factory in Yorkshire, 1830–46, and made several inventions; associated with Lord Masham in a patent, 1847; opened a factory near Paris, 1848; centralized his wool-combing business in Bradford, 1864; Liberal M.P. for Knaresborough, 1865–68, and for Keighley division, 1882–95; Baronet, 1893.

THOMAS HENRY ISMAY (1837–99); born in Cumberland; entered a shipping business, acquired White Star Line of Australian clippers in 1867, and with William Imrie founded Oceanic Steamship Company in 1868; entered the American trade, 1870.

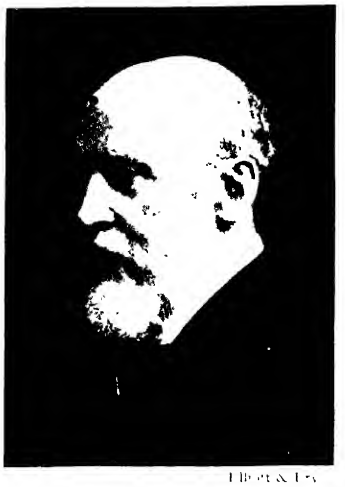
SIR ALFRED JONES (1846–1909); born in Carmarthen; was head of shipping firm of Elder, Dempster, & Co., and rendered valuable service to West African and West Indian trade; founded Liverpool School of Tropical Medicine; K.C.M.G., 1901.

SIR ROBERT LAIDLAW; born in Roxburghshire, 1856; Chairman of Whiteaway, Laidlaw, & Co., Ltd., East India merchants; Liberal M.P. for E. Renfrewshire, 1906–10; knighted, 1909.

JOHN LAIRD (1805–74); born at Greenock; a pioneer in the construction of iron ships; built up the shipbuilding business of Laird Brothers at Birkenhead; Conservative M.P. for Birkenhead, 1861–74.

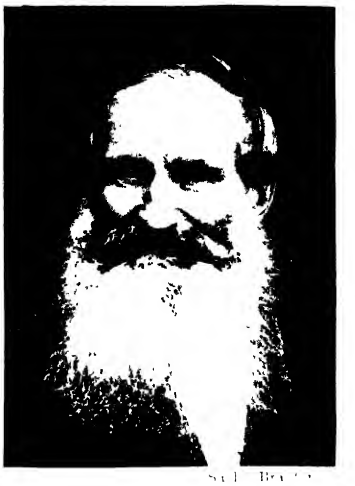
SIR WILLIAM HESKETH LEVER, BART.; born at Bolton, 1851; Chairman of Lever Brothers, Ltd., the great soap-making firm at Port Sunlight, near Birkenhead; Chairman of the Liverpool School of Tropical Medicine; Liberal M.P. for Wirral division of Cheshire, 1906–10; Baronet, 1911.

SIR THOMAS JOHNSTONE LIPTON, BART.; born at Glasgow of Irish parents, 1850; built up a great provision business, now Lipton, Ltd.; has tea and rubber estates in Ceylon; a keen yachtsman; knighted, 1898; K.C.V.O., 1901; Baronet, 1902.



SIR ROBERT HART, BART

FRANCIS W HIRST



SIR ISAAC HOLDEN, BART

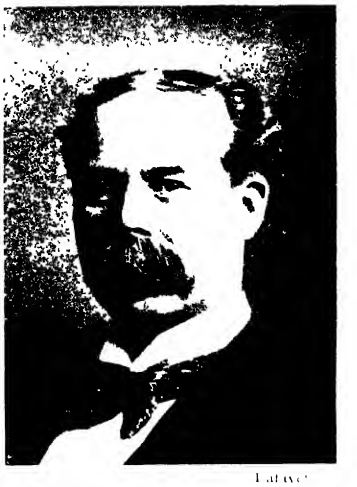
THOMAS H ISMAY

SIR ALFRED JONES, K C M G

SIR ROBERT LAIRD LAW

JOHN LAIRD

SIR WILLIAM H LEVER, BART



SIR THOMAS J LIPTON, BAR

MAKERS OF MODERN BUSINESS—IV

question that arises under this head is that of a captain of a vessel who was paid £216 a year, and received food and an allowance for washing. In determining the value of these latter items, it was held that the proper test to apply was what the reasonable cost would have been to the captain if he had had to provide these things for himself.

Casual employment, which is also excluded from the scope of the Act (unless it is employment for the purposes of the employer's trade or business), does not mean intermittent employment. If a person is employed at regular intervals he will not, in general, be regarded as a casual. Thus, a woman who did washing was employed regularly on Friday in each week and on alternate Tuesdays. She went to her employer's house on these days without a request on each occasion. She was held to be in regular and not casual employment, and so entitled to compensation for an injury therein received. On the other hand, a window cleaner, who had for two years been employed to clean the windows of a house when wanted, being requested to come each time he was wanted and paid by the job, was held to be merely casually employed.

(*b*) Was the injury, in respect of which compensation is claimed, an "accident"?

An "accident" within the meaning of the Act has been defined by the House of Lords to be "any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence", and so includes such occurrences as a man straining a muscle, ricking his back, or rupturing himself, when lifting a weight or endeavouring to move something not easily moved. The term has also been held to comprehend such occurrences as heat stroke contracted in a stokehold, and sunstroke, but not frost bite contracted by a baker on his rounds (though here the Court differed). A workman may recover compensation for an "accident" even though the accident itself was not the immediate cause of death or incapacity, but some illness resulting from or accelerated by the accident. For example, a workman was injured by a heavy pipe falling on his foot; erysipelas resulted from the injury, and from the erysipelas the man died. In another case, nephritis, from which the workman was already suffering, and from which he would sooner or later have died, was accelerated by an accident in the course of his work, and the man died in consequence. Compensation was awarded in each case. In such cases the question is: Would the man have lived but for the accident? If, save for the accident, he would not have died when he did die, it will be considered that his death resulted from an accident within the Act. Nor is the workman disentitled from recovering compensation when the accident was the result of his own physical condition, as where a workman, engaged in the work of unloading a ship, was seized with a fit and fell into the hold, suffering injury in consequence; and where a workman ruptured an aneurism by a strain when at work.

But to be an accident within the Act, the occurrence must be something capable of being described as having occurred at a definite time. Enteritis, contracted by inhaling sewer gas, for example, or overstrained heart brought on, not by sudden, but by continuously repeated exertion, could not be shown to have come about at any particular time, and accordingly were held not to be "accidents" within the Act. Certain industrial diseases have, however, been brought within the scope of the Act, and special conditions are prescribed under which workmen suffering from them may be regarded as though suffering from a personal injury by accident, and so entitled to compensation. Such are lead poisoning, miner's "beat hand" and "beat knee", which had previously been held not to be "accidents", inasmuch as the injury could not be ascribed to a definite date, together with a number of other industrial diseases.

(*c*) Was the accident one "arising out of and in the course of the employment"?

The applicant for compensation must show that the accident arose both "out of" and "in the course of" the employment. Some boys, employed in a steel works, got into some wagons running on rails, during an interval of rest, although warned not to go near them. The wagons moved, and in attempting to check their course a boy was killed. It was held that no compensation could be awarded, for although the accident may have arisen "in the course of" the employment, it did not arise "out of" the employment. Also, an injury caused by the wrongful act of a fellow servant, and having no relation to the employment, as during horseplay, does not arise "out of" the employment. On the other hand, if a workman, acting on a sudden emergency in his master's interest, does something to avert danger, although something not strictly within the scope of his employment—as, for example, stopping a horse belonging to the works, or attempting to rescue a fellow workman from a position of danger—he may, in case of injury, be held to be within the Act. Such cases, however, must be distinguished from those where a workman suffers injury while interfering in a sphere of duties not his own without the excuse that his employer's interest required him so to act, as where a boy was injured when cleaning machinery, which work was no part of his duty; or a roadman, whose duties

were confined to sweeping and putting "binding" on the road, was injured when getting up steam on the steam roller. Also, where the employment exposes the workman to peculiar risk, and injury is suffered from some cause external to the employment, such injury will be regarded as arising out of the employment. Examples are those of a bricklayer who was killed by lightning when working on a scaffold, and a cashier who was murdered for purposes of robbery at a time when he had a substantial sum of his employer's money in his possession. But compensation will not be awarded when the workman suffers injury by reason of risk needlessly taken, as where a workman climbed on the top of a hot-water tank to eat a meal and fell through. Where, during his period of employment, a workman does something for his own purpose and unconnected with his employment, during which time he suffers injury, although on his employer's premises, as where a ticket collector, having completed the collection of tickets, jumped on to the footboard of the moving train to speak to a passenger on some private matter and was killed in jumping off again, the accident is not one arising out of and in the course of the employment. On the other hand, compensation was allowed to a workman who was injured by a wall falling on him while eating his dinner during the dinner hour on the premises where he was employed, feeding himself being necessary to the work he was engaged to do.

No claim for compensation is maintainable in respect of injuries received during the period intervening between the time the workman quits and resumes his employment, but whether the employment has in fact ended or whether it has not begun is a question that must be decided by the circumstances of each case. For example, a farmer, having engaged a shepherd, sent a wagon to convey him and his furniture to the cottage where he was to live. On the way he fell off the wagon. A claim for compensation being made, it was held that the employment had not begun. Again, an engine driver, to begin the work of the day, had to proceed to the engine shed. It was held that it was at the engine shed that his employment began, and that an accident occurring to him while proceeding thither along the railway line was not within the Act. But the beginning of a man's employment does not necessarily coincide with the beginning of his work. A workman who fell into an excavation on the premises where he was employed, while proceeding to deposit his ticket at the office at the entrance of the works twenty minutes before the time for commencing work, was held to be within the "reasonable margin before the time of commencing actual work" that can be considered as coming within the period of employment. Again, the applicant, to get to his work, had to pass through an iron gate on the employer's premises a hundred yards from the lamp-room where he had to go to. The gate slammed and injured him. It was held that the accident arose out of and in the course of the employment. Similar questions arise as to the moment when employment terminates. In general, the employment is taken to continue while the workman is making his exit from the place where he is employed. Workmen have been held to be within the Act and entitled to compensation in respect of an injury received when going to the colliery pay-office for wages after leaving work, and when proceeding home from work on a railway provided by the employers for the gratuitous conveyance of the workmen. In regard to a commercial traveller, it has been laid down that his employment continues from the time he leaves his home on his employer's business until he returns to his home.

If, as sometimes happens in cases where a workman is found dead, but no one witnessed the manner of his death, the available evidence is equally consistent with the view that the accident did or that it did not arise out of and in the course of the employment, the applicant for compensation cannot succeed. It is not enough to say that the accident would not have happened had the man not been at work. So when a sailor was killed while returning to his ship, and the evidence was equally consistent with the view that he had gone ashore on the ship's business, or that he had gone for his own purpose, the onus of proof was held not to have been discharged by the applicant. But it does not follow that an accident will never be held to have arisen out of and in the course of the employment unless direct evidence is available concerning the cause. It is open to the arbitrator to infer from known facts that an accident did so arise. A miner died from a crushed finger which produced blood poisoning. The arbitrator was held entitled to infer that it was done while the man was at his work, inasmuch as it was work of such a character that such accidents were more likely to occur then than when the man was not at work.

Compensation is not payable when the injury does not disable the workman for at least a week from earning full wages at his work, nor (except in cases where the injury results in death or serious and permanent disablement) when the injury is due to the workman's serious and wilful misconduct. The latter defence is difficult to establish,

and can only succeed in a limited number of cases. A man may have been negligent or acted stupidly, but it does not follow that he will be found guilty of "serious and wilful misconduct". It was found serious and wilful misconduct in a sawyer who deliberately and intentionally refrained from using the guard for a circular saw after frequent orders that the guard was to be used; but a breach of rules, or ignorance of them, does not necessarily amount to such misconduct, although it may so be found. It was said in one case that the sort of misconduct referred to was such as that represented by a miner striking a match to light his pipe when in the mine, or a workman walking into a gunpowder factory wearing nailed boots instead of the list slippers provided.

The persons entitled to claim compensation are, in the case of a non-fatal accident, the injured workman, and when the accident results in the workman's death, his dependents, but, in the latter case, any lump sum due is to be paid into the County Court. Included in this term "dependent" are wife or husband, parent, grandparent, step father, step-mother, child, grandchild, stepchild, brother, sister, half-brother or half-sister; also illegitimate children, and the parents when the workman was himself illegitimate. Dependents are total or partial, according as they were wholly or in part dependent on the workman's earnings at the time of his death. By paying into Court a lump sum for which he admits liability, the employer may escape further proceedings arising out of questions as between the dependents themselves, such as whether or not certain persons are dependents, or the proportions of distribution among them.

The Act includes provisions enabling the workman engaged on works which are the subject of sub-contracts to claim compensation either from the principal contractor or from the sub-contractor who is his immediate employer. A principal contractor so paying compensation has a right of indemnity against the man's real employer.

(*a*) In case of death a lump sum is payable, which varies according as the workman leaves total dependents, partial dependents, or neither. In the case of total dependents the sum payable is not less than £150 and not more than £300. If the workman was employed with the same employer during the three years preceding his death, the amount is a sum equal to his aggregate earnings during those three years, deducting any weekly payments already made. If the workman had been with the employer for a less time than three years, the amount is arrived at by multiplying by 156 his average weekly earnings during the time he actually was with the employer. In each case the above-mentioned maximum and minimum limits must be observed.

If the workman leaves only partial dependents, the sum payable is to be that which is "reasonable and proportionate to the injury to the said dependents", but in no case exceeding the amount that would be payable to total dependents. It is the reasonable, not the maximum, sum to which regard should be had.

If there are no dependents at all, only medical and burial expenses up to £10 are payable.

(*b*) When the accident does not result in the workman's death, but produces incapacity for work, compensation takes the form of a weekly payment during such incapacity, the maximum being £1 per week. The actual weekly amount payable, subject to that limit is, for total incapacity, fifty per cent of his average weekly earnings during the previous twelve months or during any less period that he has been continuously with the same employer. If the workman is under twenty-one at the date of the injury, and his average weekly earnings are less than £1, his whole average earnings represent the compensation he can claim, with a maximum, however, of ten shillings. For partial incapacity the weekly payment is arrived at in the same way, but must not exceed "the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident", regard being had to his physical state.

In fixing the weekly payment, the employer is entitled to take into consideration "any payment, allowance, or benefit" received by the workman from him during incapacity.

The "earnings" which constitute the basis for the calculation of compensation include sundry advantages that may be enjoyed by the workman in addition to pecuniary wages—board and lodging, for instance. It has also been held that a waiter's tips should be taken into account. On the other hand, the gross may not represent the real earnings. A miner employed a drawer, whom he paid out of his wages. It was held that amounts so paid to the drawer should be deducted from the miner's wages to ascertain his "earnings".

Notices in writing of the accident must be given as soon as practicable, and before the workman has left the employment in which he was injured; and the claim for compensation must be made within six months from the date of the accident. This provision was inserted in the Act in order that the employer may, with as little delay as possible, enquire into all the circumstances of the injury and its consequences, and

accordingly (unless the applicant can show that the employer is not prejudiced in his defence by the want of notice, or that failure to send in notice or claim was due to mistake, absence from the United Kingdom, or "other reasonable cause") disobedience to this provision bars the right to compensation.

The employer may require an injured workman to submit to a medical examination, either with a view to determining whether or not to admit liability in the first place or, having paid compensation for some time, with a view to determining whether to diminish or discontinue the weekly payment. The cost of the examination must be borne by the employer, but refusal on the part of the workman to submit to such examination entails the suspension of his rights under the Act. A workman is, however, entitled to have his own doctor present at the examination.

Either employer or workman is entitled to a "review" of a weekly payment of compensation, the former on the ground that the workman has got better, and the latter if he considers that his incapacity has increased; and the amount of compensation may be ended, diminished, or increased accordingly. Mere fluctuation in wage rates is insufficient reason for a review.

The question not infrequently arises whether the employer can insist on the injured workman undergoing an operation with a view to a cure or an improvement in his condition, and the consequent ending or diminishing of compensation. If there is any risk, the workman cannot be required to undergo an operation. The question is whether his refusal is unreasonable, not whether, on the balance of medical evidence, an operation is reasonably safe. If, for example, the workman declines an operation on the advice of his own medical attendant, his refusal is not considered unreasonable, and the employer cannot, on the ground of such refusal, ask for a review. But, in a case where the medical view is that there is no serious risk or pain attending the proposed operation, the workman's refusal to submit entails a risk of losing or suffering a diminution of his weekly compensation.

If the result of a review is to terminate absolutely the payment of weekly compensation, the effect is to end the matter once and for all. It is a common practice, accordingly, where it is impossible to say whether or not the workman has finally recovered with no fear of subsequent mischief, to keep the matter alive by a nominal weekly payment of one penny. The workman is then able, should fresh mischief develop as a consequence of the injury, to apply for a review and an increase of compensation.

Where any weekly payment has been continued for six months or more, the employer is entitled to redeem such payment for a lump sum. If the capacity is permanent, the measure of commutation is an immediate life annuity "equal to seventy-five per cent of the annual value of the weekly payment". In other cases the amount may be arrived at by arbitration, and there is nothing to prevent the sum being arrived at by agreement.

If questions as to liability to pay compensation or the amount thereof are not settled by agreement, resort must be had to arbitration. Such arbitration may be by means of a committee representative of employer and workman, a single arbitrator agreed on between the parties, or, as is most usual, in the County Court.

Care should be taken to obey the provisions of the Act requiring agreements with regard to the amount of compensation, or the subsequent variation of that amount, or any other question arising under the Act, to be sent to the Registrar of the County Court for record. In the absence of such registration, the employer may find that the agreement has not had the desired effect of relieving him from liability to pay further compensation.

MASTER'S RESPONSIBILITY FOR THE ACTS OF HIS SERVANT

Torts

For wrongful acts of the class called torts, of which negligence and false imprisonment are familiar instances, done by his servants, the master is responsible and may be made answerable in damages, provided the servant's tortious act was committed in the course of his employment, and was within the scope of his employment. The employer whose carman has driven over someone in the street, or has run into and damaged someone else's vehicle, is a very frequent defendant in actions for negligence by reason of the operation of this rule. Whether the act complained of was within the scope of the servant's employment and committed in the course thereof, is frequently difficult to determine. Familar examples, illustrating the distinction, are those of the two employees who left the water running in the lavatory, with the result that the premises below were damaged. In one case, the clerks had been forbidden to use the lavatory at all, and it was therefore held that the clerk, in leaving the water running, was not acting within the scope of his

authority, and that his employer was therefore not liable. In the other case, the use of the lavatory by the employee was allowed, and the result of the case was therefore the other way. Again, if an employee, suspecting an offence in respect of the property of his employer to have been committed by a certain person, gives that person into custody, and the charge proves unfounded, the question whether or not the employer is liable in an action for false imprisonment, and probably malicious prosecution as well, will be determined according as the employee can be shown to have had or not to have had his employer's authority so to act. In some cases, where express authority cannot be shown, the position of the servant is such that the Court would hold that he had an implied authority to give a person into custody.

This liability of the master for his servant's acts may exist even though the act complained of is contrary to the master's orders, provided it is done in the course of the employment and is intended to be for the benefit of the master, as where an omnibus driver, endeavouring to obstruct another omnibus, pulled across the road, although contrary to orders, and by so doing upset his rival.

Where, however, the act complained of occurred when the servant was engaged in something entirely on his own account, as where he runs over someone with his employer's carriage, which he has taken out for a purpose entirely his own, the servant alone is responsible. Nor is the master answerable for his servant's malicious or wilful act; as if he were, for example, to drive deliberately into another carriage in a spirit of wantonness or spite, or in a fit of temper. But a slight deviation by the servant from the scope of his employment, as where a servant, while out on his master's business, goes somewhat out of his way in order to transact some business of his own, as to call on a friend or deliver a parcel, does not relieve the employer from responsibility. Again, a master who temporarily lends a servant to another is not responsible for the tortious acts of that servant done in the course of that temporary service while beyond the control of the permanent master.

It is frequently necessary to determine the preliminary question whether a person, employed by another, was in the position of servant or contractor to that other.[1] If the relation is that of employer and contractor, the former is not generally liable for the tortious acts of the latter, although he may be, as where he personally interferes in the work, or if he has employed the contractor to do an unlawful act, to lay down pipes in a public highway without statutory authority, for example.

Contracts

Whether or not a master is bound by contracts entered into by his servant depends on the question whether or not the latter had authority, express or implied, to make the contract in question. The mere fact that the relationship of master and servant exists implies no such authority. The question belongs to the branch of law concerned with Principal and Agent. (See Chapter II of this Part.)

THIRD PARTIES AND THE RELATION OF MASTER AND SERVANT

Inducing Breach of Contract

It is an old rule of law that the master is entitled to recover damages from a third party whose wrongful act causes loss of service, as where such third person entices away a servant. Loss of service is also the basis of an action for seduction, although when it is the parent who sues, such loss of service frequently approaches the region of legal fictions. Where, however, the third party's act causes the servant's death, the master's right to sue for loss of service disappears.

Corrupt Practices

Bribes, secret commissions, or other corrupt inducements to servants to do or refrain from doing something in regard to their employer's affairs or business, is a misdemeanour both in him that gives and him that takes, and is punishable by fine or imprisonment or both.[2]

CRIMINAL OFFENCES BY AND AGAINST SERVANTS

Employers and servants are, of course, amenable to the criminal law in respect of offences committed against each other, as though the relation of master and servant did not exist. In addition, however, there are certain provisions of the criminal law peculiarly concerning persons in that relation.

[1] See definition of "servant", p. 78.

[2] See Prevention of Corruption Act, 1906, and Chapter II of this Part.

Larceny, otherwise theft, by clerks or servants, of chattels, money, or valuable securities belonging to or in the possession of their masters, is more severely punished than ordinary larceny. Embezzlement, that is to say, the unlawful appropriation to his own use by a clerk or servant of property received by him on account of his employer, is a felony. In larceny, property is stolen which has been in the master's actual or constructive possession, as where money is taken from the cash box. In embezzlement, the property is appropriated before it gets into the master's possession, as where the clerk or servant, receiving money from a customer on behalf of his employer, at once puts it in his own pocket. To be guilty of embezzlement, a person must be a clerk or servant to an employer, and frequently it is a difficult question whether or not that relationship exists. It is a misdemeanour for any clerk, officer, or servant wilfully and with intent to defraud, to destroy, alter, mutilate, or falsify any book, paper, or accounts in his employer's possession, or to make false entries therein. In certain instances, breach of the contract of employment may be a criminal offence, namely, in the case of a person employed by a gas or water company or authority who knows or has reasonable cause to believe that the probable consequence of his breach of contract of service will be to deprive the inhabitants of the place wholly or to a great extent of their supply of gas or water; or in the case of a person who knows or has reason to believe that the probable consequence of such breach will be to endanger human life, or to cause serious bodily injury, or to expose valuable property to destruction or serious injury. Forging or uttering a forged servant's character or giving a false written character are also punishable offences.

If a master, who is legally liable to provide for any servant or apprentice the necessary food, clothing, or lodgings, wilfully and without lawful excuse neglects to provide the same, or unlawfully and maliciously causes bodily harm, so that the life of such apprentice or servant is endangered, or his health is or is likely to be permanently injured, such master is guilty of a misdemeanour, and is liable to imprisonment.

Before instituting a prosecution, the employer should make very sure of his ground. Unsuccessful criminal proceedings launched without reasonable or probable cause, that is to say, without taking reasonable care to ascertain the true facts, and that the facts constituted good *prima facie* grounds for a prosecution, may result in the bringing of an action for malicious prosecution by the person against whom the proceedings were taken.

APPRENTICESHIP

By a contract of apprenticeship, the apprentice is bound to the master for the purpose of learning the latter's trade or calling, the apprentice undertaking to serve the master for that purpose, and the master undertaking to teach the apprentice. A person may be none the less an apprentice because he does work of the kind done by the master's servants, or because he receives remuneration.

As the term of apprenticeship generally exceeds a year, the contract should usually be in writing. In practice, articles of apprenticeship generally take the form of a deed. The instrument of apprenticeship must be executed by the apprentice whether or not he be a minor, and the parent or guardian is usually, though not necessarily, a party. There is a stamp duty of 2*s.* 6*d.* on apprenticeship instruments, which must be discharged before execution, and, in the absence of stipulation to the contrary, paid by the master; but there are exemptions in favour of apprentices to the sea services, parish apprentices, and persons apprenticed by public charities.

Except in the case of parish apprentices or sea apprentices, or apprentices to chimney sweeps, in regard to whom there are special statutory provisions, the age of the proposed apprentice is of no account, provided he is over seven. A contract of apprenticeship being regarded as *prima facie* for his benefit, such a contract is binding on an infant, and is accordingly an exception to the general rule that contracts entered into by minors do not bind them. If, however, there are covenants which make the apprenticeship instrument inequitable or prejudicial to the infant, it can be set aside.

In addition to the right to receive instruction, an apprentice residing with the master is entitled to medical attendance in addition to food and lodging. An apprentice cannot be required to work on Sundays, and he cannot, in the absence of stipulation to the contrary, be dismissed for mere misconduct; but it is a defence to an action against the master on the covenants of the indenture for not teaching the apprentice that the latter absented himself or was an habitual thief, and the master may himself administer moderate corporal punishment for misconduct. The master is entitled to and may sue for the earnings of his apprentices. Disputes between apprentice and

master may, where the premium paid does not exceed £25, be heard by a court of summary jurisdiction, and that Court is empowered to order the apprentice to perform his duties under pain of imprisonment, and on the other hand it may rescind the instrument of apprenticeship and, if it thinks it to be just, may order the whole or part of the premium to be returned.[1]

The contract of apprenticeship is terminated by the death of the master before the expiration of the term, unless the apprentice bound himself to serve the executors and administrators of the master, or a firm and its successors; and in the event of death there is no claim, in the absence of express stipulation, to the return of any part of the premium paid.

TRADE UNIONS AND TRADE DISPUTES

For the purpose of the various statutes governing trade combinations, the term "trade union" includes combinations of employers as well as of workmen.

Actions against Trade Unions

By the Trade Union Act, 1871, trade unions ceased to be societies which were unlawful, as being in restraint of trade. On the other hand, in the Taff Vale case[2] it was decided that a registered trade union could be sued and its funds held liable in damages in respect of those wrongful acts classed as torts, when committed by the agents of the union acting within the scope of their authority. By the Trade Disputes Act, 1906, however, that decision is overridden, and immunity has been conferred on trade unions in respect of any tortious act committed by or on behalf of such trade union. It does not appear that this immunity extends to trade union officials in their individual capacity. Strikes or lock-outs are lawful, save in so far as they are attended by acts in themselves criminal.

Picketing

By the Conspiracy and Protection of Property Act, 1875, it was made an offence punishable by fine or imprisonment for any person, with a view to compel another to do or abstain from doing any act which he has a right to do or not to do, to work for a particular employer, for example, wrongfully and without legal authority to use violence or intimidation towards him, or persistently to follow him about, or to hide or deprive him of his tools, or to watch or beset the place where he resides, works, or carries on business or happens to be, or the approach thereto. Attending merely to communicate or obtain information was not "watching or besetting", but in *Lyons v. Wilkins* (1896) it was held that watching and besetting for the purpose of peacefully persuading was an offence under the statute. The Act of 1906, however, makes it lawful for persons acting "in contemplation or furtherance of a trade dispute" to attend at such places "if they attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working".

Conspiracy

Again, while the 1875 Act gave protection to trade combinations in regard to liability to criminal proceedings for conspiracy (that is to say, in respect of the crime consisting in an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means), liability to a civil action for conspiracy remained where it could be shown that damage had resulted to some person or persons. In *Quinn v. Leathem* (1901) the defendants were so held liable. The Trade Disputes Act, 1906, gives protection in regard to civil in addition to criminal liability.

Inducing to Break Contract

Further, by the Act of 1906, the liability to an action for inducing a person to break a contract of employment, or for interfering with some other person's trade, business, or employment, is removed in cases where done in contemplation or furtherance of a trade dispute. For the protection of this provision to be of avail, a trade dispute must be impending or actually in existence, "trade dispute" here meaning a dispute between employers and workmen or workmen and workmen as to employment.

Conciliation

The Board of Trade have power, under the Conciliation Act, 1896, in case of differences between employers and employed, on the application of both parties, to appoint an arbitrator, or, on the application of one, a conciliator.

[1] See Employers and Workmen Act, 1875.

[2] *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, 1901.

NOTE ON SCOTS LAW OF MASTER AND SERVANT

Scots law on this subject does not differ materially from that of England, but the following points of divergence may be noted. A contract of service which is meant to exceed one year in duration must be reduced to writing, otherwise it may be proved by witnesses. If the period of service be not expressly fixed by the contract, the engagement is presumed to be for the period which is customary in regard to the particular service. Thus domestic servants are presumed to be hired by the half-year; farm servants and gamekeepers by the year; and gardeners (who are not, as in England, menial servants) probably by the year. The customary period of notice of termination is forty days, or the period of the service if it be shorter, but a servant engaged by the month is entitled to only a month's warning. The notice may be either explicit or implied, as when a gentleman informs his coachman of his intention to give up his horses and carriage at a certain term. But in any case the contract may be terminated by the payment of the servant's wages, or proportional wages, and in some cases board wages. In the case of superior servants, such as governesses, tutors, managers, or clerks, the rule is that, in the absence of express stipulation, the engagement is terminable by reasonable notice on either side, what is reasonable being a question of fact in each particular case. If at the expiry of a term of service no other arrangement is made, the contract is presumed to be renewed for the customary period. The marriage of a female servant and the enlistment of a male are no excuses for desertion nor the breaking of the contract. Militia service only involves an abatement of wages. "Injunction" against a servant is in Scots law known as "interdict". It has not been expressly decided in Scotland that a master giving a false character in favour of a servant is liable in damages to a future master who is injured thereby, but the English rule on the subject would probably be followed.

[AUTHORITIES.—*Macdonnell* or *Manley Smith*, on "Master and Servant"; *Knowles*, *Ruegg*, or *Willis*, on "Employers' Liability"; *MacSwinney* on "Mines"; *Redgrave* on "Factory Acts".]

For the National Insurance Act, 1911, see Part III, Chapter XIX, and for the Shops Act, 1911, see p. 229.

CHAPTER XI

BANKRUPTCY AND INSOLVENCY

Introductory—Who may be made Bankrupt and Acts of Bankruptcy—The Bankruptcy Courts and the Petition—The Adjudication of Bankruptcy—Property Divisible amongst Creditors and its Administration—Proof of Debts and Payment of Dividends—Duties of Official Receivers and Trustees—Discharge of the Bankrupt—Small Bankruptcies—Bankruptcy Administration of Insolvent Estates—Fraudulent Debtors—Disqualifications of Bankrupts—Arrangements outside the Bankruptcy Acts—Insolvency and Sequestration in Scotland—Bankruptcy and Insolvency in Ireland.

INTRODUCTORY

The law of bankruptcy is designed for two main purposes: First, where a person's financial position has become involved, it enables his creditors to obtain the administration of his estate, or himself to seek the protection of the Court, and, on surrender of his property, to secure a complete discharge from his debts. In this sense bankruptcy is a privilege conferred at first only on traders, but now extended practically to everyone, enabling a person to discharge himself once and for all from his encumbrances. It is, however, a "privilege" only to be valued by those whose circumstances are otherwise irremediable, and most people make every effort to escape the consequences and the stigma of bankruptcy. Secondly, bankruptcy secures that the property of the debtor shall be equally divided amongst the various creditors, who shall receive a portion or the whole of their debts rateably with each other, subject to a few preferential claims. Bankruptcy need not necessarily follow embarrassed circumstances. Compositions or schemes may be effected, either under the Bankruptcy Acts or outside them. These must generally be registered and become subject of public notice. They are included in the Annual Returns made by the Board of Trade. Official returns show a tendency towards a smaller number of failures, but a larger amount is involved. Between 7000 and 8000 bankruptcies and deeds of arrangement may be said to be the annual tale, while nearly £8,000,000 is thus lost by creditors in England and Wales alone. In Scotland sequestrations and cessios number over 400, with liabilities at nearly £1,000,000. Registration of deeds not being obligatory, figures are not available. In Ireland bankruptcies and deeds of arrangement show liabilities of about £350,000.

Bankruptcy proceedings are taken either on the initiative of some creditor or by the debtor himself, by petition to a Court of competent jurisdiction. Administration of the bankrupt's property takes place under the control of the Board of Trade as far as England and Wales are concerned. The laws of Scotland and Ireland are essentially different; but the English Bankruptcy law is now contained in two statutes of 1883 and 1890, and principally in the former. It is essential for the presentation of a petition in bankruptcy that the debtor shall have committed an act of bankruptcy, and what is an act of bankruptcy is a matter requiring some examination.

A petition can only be presented for a debt of at least £50, of an ascertained amount payable at some fixed time. The act of bankruptcy must have occurred within three months before the presentation of the petition, and the debtor must be within the jurisdiction. If the Court is satisfied on the petition, a receiving order is made, the immediate effect of which is the protection of the estate, the official receiver becoming invested with the property of the bankrupt, and individual suits by creditors being suspended. The official receiver

is the official appointed by the Board of Trade as trustee of the estate until any other trustee is appointed. He conducts the public examination of the bankrupt, summons and presides at meetings of creditors, and reports to the creditors as to any proposal made by the debtor. Full disclosure must be made to him by the debtor of his affairs, and the debtor must undergo a public examination on a day appointed by the Court, and must furnish a full statement of his affairs, so as to assist the due administration of the estate. The first general meeting of creditors is held soon after the receiving order, and it is for the creditors then to decide whether there shall be an adjudication in bankruptcy or an acceptance of any scheme put forward by the debtor. If they decide on bankruptcy, the Court will adjudge the debtor bankrupt. The creditors may then appoint a person as trustee of the property, or leave the appointment to a committee of inspection or to the Board of Trade. On his appointment the property of the bankrupt passes to the trustee, who must then take account and be responsible for the debtor's property and the winding-up of the business. With the consent of the committee of inspection, a trustee may carry on the business. Each creditor must prove his debt by sending in to the official receiver full particulars, supported by affidavit. This proof may be rejected by the official receiver, subject to appeal, or a creditor may expunge his proof; and the assets are divisible amongst those only who have proved their debts. Certain creditors may hold security for their debts, which must be valued, and they can then prove for any balance. What property of the bankrupt is available for paying debts will be carefully considered later, but a trustee has the power in certain cases which the debtor had not of disclaiming onerous property. The cost of the administration of the estate is the first charge upon the available assets, but subject to this and to preferential claims, as the estate is realized, dividends are paid to the creditors, and a final dividend when all the property has been realized. In certain cases a bankrupt may speedily secure his discharge, and even have his bankruptcy annulled on the payment of his creditors in full. On the bankrupt's application for his discharge, the official receiver makes a report to the Court, and the order depends largely upon the conduct of the bankrupt. The order, if not granted, may be either refused or suspended for a period not less than two years, or until a certain dividend is paid, or an agreement made for the payment of the balance out of future earnings. Having obtained his discharge, a bankrupt is relieved from all the debts which were proved in the bankruptcy, other than a small special class. Certain important disqualifications attach to bankruptcy.

WHO MAY BE MADE BANKRUPT AND ACTS OF BANKRUPTCY

Speaking generally, any person, whether in trade or not, can be made bankrupt either on a petition presented by a creditor or on his own petition. It is safest to say that an infant, even though carrying on trade, cannot be made bankrupt. A married woman cannot be made a bankrupt unless she is carrying on a business separately from her husband. The assets and profits of the business must belong wholly to the wife. Lunatics may be made bankrupt in respect of a debt and act of bankruptcy committed while sane. Foreigners who are domiciled in England are subject to the bankruptcy law, or those who within a year before the date of the presentation of the petition have ordinarily resided or had a dwelling-house or place of business in England. Ambassadors and members of their suites are not subject to British jurisdiction. Corporations, associations, and companies, registered under the Companies Act, are not subject to bankruptcy proceedings, but to the analogous proceeding of winding-up. (See Chapter IV of this Part.)

It is essential, before a person can be made a bankrupt on a creditor's petition, that the debtor should have committed an "act of bankruptcy", and the amount of the debt or debts must be at least £50. "Acts of bankruptcy" have been defined by statute, and are committed under the following circumstances:—

1. *If in England or elsewhere the debtor makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.* This means a conveyance for the benefit of *all* his creditors, not those of a certain class, as, for example, his trade creditors only It is an act of bankruptcy because thereby the debtor seeks to put his property to a different application from what it would originally have if bankruptcy proceedings ensued, substituting an assignee for the trustee. If a creditor has assented to the deed, however, he may not take advantage of it as an act of bankruptcy unless his assent was secured by misrepresentation, or other creditors have obtained an advantage. Such a deed requires registration.

2. *If in England or elsewhere the debtor makes a fraudulent conveyance, gift, delivery, or transfer*

of his property, or of any part thereof. An assignment for a past debt, in fraud of other creditors, will be avoided. The *bona fide* sale of the debtor's property is not of itself an act of bankruptcy, as the purchase money becomes available for the creditors; but if a sale is merely intended to defeat or delay creditors, or to enable the debtor to abscond, it is an act of bankruptcy, although an innocent purchaser is protected. To be valid, the conveyance must be both *bona fide* and for good consideration. A settlement in consideration of marriage, which is really a fraud on creditors, will be set aside, and so if a person without debts at the time makes a conveyance before engaging in a risky undertaking.

3. *If in England or elsewhere the debtor makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would be void as a fraudulent preference were he adjudged bankrupt.* (As to fraudulent preference, see p. 117.)

4. *If, with intent to defeat or delay his creditors, a debtor either departs out of England, or, being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.* The intent to defeat or delay creditors is the essential element, and will be inferred from circumstances. Where a debtor makes it impossible for his creditors to discover his whereabouts, it will be presumed that he is endeavouring to escape from them.

5. *If execution against a debtor has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days; provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, is taken into account in calculating such period of twenty-one days.* This gives the advantage to the creditors in bankruptcy over the execution creditor (see p. 117, and as to "Execution", "Interpleader", see Chapter XXVI of this Part.)

Form 1

(General Title of all Bankruptcy Proceedings)

In the High Court of Justice;
{or in the County Court of .....
..... holden at .....}

In Bankruptcy. No. . of 19.

Re (A. B.)

[*Ex parte* (*here insert* "the Debtor", or "C. D., a creditor", or "the Official Receiver", or "the Trustee").]

6. *If a debtor files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.* A form is prescribed for such a declaration as follows:—

Form 2

Declaration of Inability to Pay

(Title)

I, *A. B.* (*name and description of debtor*), residing at ..... . (*and* carrying on business at .. ..), hereby declare that I am unable to pay my debts.

Dated this ..... day of ....., 19...

(*Signature*) A. B.

[Signed by the debtor in my presence.]

Signature of Witness . .....
Address . ...
Description ... .
Filed the ..... day of ... . . ., 19 ...

NOTE.—Where the debtor resides at a place other than his place of business, both addresses should be inserted.

7. *If a creditor has obtained a final judgment against a debtor for any amount, and, execution thereon not having being stayed, has served on him in England, or by leave of the Court elsewhere, a bankruptcy notice, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice in England, or within the time limited by the order giving leave to effect the service elsewhere, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the judgment debt, and which he could not set up in the action in which the judgment was obtained,* The forms of request for and of "bankruptcy notice" are prescribed as follows:—

Form 3

Request for Issue of Bankruptcy Notice

In the [High Court of Justice].
In Bankruptcy.

1. I, *C. D.*, of . .. ., hereby request that a bankruptcy notice be issued by this Court against [*here insert name, description, and address of judgment debtor*].

2. The said *A. B.* has for the greater part of the past six months resided at ..... [*or* carried on business at .....] within the district of this Court [*or, as the case may be, following the terms of Section 95 of the Act* (p. 102)].

3. I produce an office copy[1] of a final judgment against

[1] In the County Court, a certificate of the judgment.

the said *A. B.* obtained by [me] in the .... Court on the ..... day of .....

4. Execution on the said judgment has not been stayed.

Dated this ..... day of ....., 19...

C. D., judgment creditor,

or,

[*E. F.*, solicitor for the judgment creditor].

NOTE.—Where the debtor resides at a place other than his place of business, both addresses should be inserted.

Form 4

Bankruptcy Notice

(*Title*)

To *A. B.* [or *A. B. & Co.*] of ....

Take notice that within [*seven*] days after service of this notice on you, excluding the day of such service, you must pay to *C. D.*,[1] of ...., the sum of £ claimed by him as being the amount due on a final judgment obtained by him against you in the ..... Court. dated ....; whereon execution has not been stayed, or you must secure or compound for the said sum to [his] satisfaction or the satisfaction of the Court; or you must satisfy the Court that you have a counter-claim, set-off, or cross demand against *C.D.* which equals or exceeds the sum claimed by him, and which you could not set up in the action in which the judgment was obtained.

Dated this ..... day of ...., 19.

By the Court,

.... *Registrar.*

Indorsement on Notice

You are specially to note,—

That the consequences of not complying with the requisitions of this notice, are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you.

If, however, you have a counter-claim, set-off, or cross demand which equals or exceeds the amount claimed by *C. D.* in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within ..... days apply to the Court to set aside this notice, by filing with the Registrar an affidavit to the above effect.

[*Name and address of solicitor suing out the notice*] *or*

This notice is sued out by [*C. D.*] in person.

Non-compliance with such a notice is a most common ground of bankruptcy, but resort to such a notice often secures the payment of a debt when other steps would be unavailing. Any creditor may petition.

The notice must not be founded on more than one judgment debt, but may be issued against the partners when judgment has been recovered against a firm. A notice cannot be founded in England on a Scotch judgment, and it must be for the whole debt.

8. *If a debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.*

This notice need not be in writing, but it must be a deliberate intimation from which an ordinary creditor would assume suspension. It generally takes the form of a circular offering a composition, and hence the danger of negotiation by a man in difficulties who wishes to avoid bankruptcy and does not understand the law.

THE BANKRUPTCY COURTS AND THE PETITION

The Court in Bankruptcy

The Courts having jurisdiction to entertain bankruptcy petitions are the High Court and the local bankruptcy courts. In the High Court all matters are assigned to a special judge selected from time to time by the Lord Chancellor. The High Court includes the jurisdiction of the old London Bankruptcy Court, and comprises the districts of the City of London and its liberties and places within the districts of the Metropolitan County Courts. The provincial Bankruptcy Courts are the local County Courts, unless they are specially excluded from bankruptcy jurisdiction. It is only natural that the large majority of bankruptcies should be administered in the County Courts.

[1] In the County Court, "pay to the Registrar of the above Court".

The Court for Petition

A petition against a debtor or by a debtor who has resided or carried on business within the London Bankruptcy district for the greater part of the six months immediately preceding the presentation, or for a longer period during those six months than in the district of any County Court, or against a debtor not residing in England, or one of whom the petitioning creditor is unable to ascertain the residence, is presented to the High Court. In other cases the petition is presented to the County Court of the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation.

Petitioning in the wrong Court, however, does not invalidate the proceedings, which may be transferred from one Court to another.

Jurisdiction

County Courts with bankruptcy jurisdiction, in addition to their ordinary powers, have all the bankruptcy powers and jurisdiction of the High Court. The registrars in bankruptcy of the High Court, and the registrars of a County Court having jurisdiction in bankruptcy, have special powers under the statute, and orders made or acts done by them in the exercise of such powers and jurisdiction are deemed to be acts "of the Court". These powers are as follows:—

(*a*) To hear bankruptcy petitions, and to make receiving orders and adjudications thereon; (*b*) To hold the public examination of debtors; (*c*) To grant orders of discharge where the application is not opposed; (*d*) To approve compositions or schemes of arrangement when they are not opposed; (*e*) To make interim orders in any case of urgency; (*f*) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in Chambers; (*g*) To hear and determine any unopposed or *ex parte* application; (*h*) To summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings, or property.

In the High Court, registrars have power to grant orders of discharge and certificates of removal of disqualification, and to approve opposed compositions and schemes of arrangement, but no registrar has power to commit for contempt of Court; he will refer the case to the judge. The powers of a bankruptcy registrar of the High Court may be conferred upon any specified registrar of the County Court.

The Court may generally exercise its jurisdiction while sitting in Chambers, but certain matters are heard in open court, namely, the public examinations of debtors; applications to approve a composition or scheme of arrangement, and for orders of discharge and certificates of removal of disqualifications; appeals from the Board of Trade to the High Court; applications to set aside or avoid any settlement, conveyance, payment, &c., or to declare for or against the title of the trustee to any property adversely claimed; applications for the committal of any person for contempt; appeals against the rejection of a proof, or applications to expunge or reduce a proof where the amount exceeds £200; applications for the trial of issues of fact with a jury, and the trial of such issues.

The general powers of Bankruptcy Courts include the decision of all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem expedient or necessary to decide, for the purpose of doing complete justice or making a complete distribution of property. But owing to their ordinary limitations, such jurisdiction must not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy, which might have been enforced by action in the High Court, unless all parties to the proceeding consent, or the amount involved does not, in the opinion of the judge, exceed £200. On the other hand, a Bankruptcy Court is not subject to be restrained in the execution of its powers by the order of any other Court, and appeals are only permissible as specially directed. If either of the parties desires any question of fact to be tried by a jury, or the Court thinks such an issue should go before a jury, the Court may direct a trial by jury. In the High Court, when a receiving order has been made, the judge making it may order the transfer of any action pending against the bankrupt to such judge. Where a trustee, debtor, or other person makes default in obeying any order or direction given by the Board of Trade, or by any official receiver or any other officer of the Board of Trade acting under statutory powers, the Court may order such person to comply, or make an immediate order for the committal of such person, as well as exercise any other right or remedy.

Bankruptcy Courts having jurisdiction in England, Ireland, and Scotland enforce the orders of each other. Every British Court with jurisdiction in bankruptcy or insolvency acts in aid of and as auxiliary to any other in bankruptcy matters, and warrants issued by Bankruptcy Courts are enforced in the same way throughout His Majesty's dominions as warrants issued by justices of the peace; and search warrants in the same manner as such warrants for stolen property.

Appeals

In the High Court, appeals, whether from the registrar or the judge, are to the Court of Appeal, and, by leave, thence to the House of Lords. In consent orders, orders relating to property up to £50, or discretionary orders, there is no appeal. Appeals from the County Court are to a Divisional Court of the High Court in Bankruptcy, and thence, by leave only, to the Court of Appeal.

The Petition

A creditor's petition must be founded on one of

the acts of bankruptcy occurring within the preceding three months, which have been already discussed. If the petitioning creditor is a secured creditor, he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he is admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor. A creditor's petition must be on a liquidated sum for a debt or debts of at least £50. The petition must be verified by affidavit (Form 5a) of the creditor or some person on his behalf having knowledge of the facts, and personally served by delivering to the debtor a sealed copy of the filed petition in accordance with the rules, unless the Court makes an order for substituted service or for service out of the jurisdiction, or upon the personal representatives of the debtor in case of death. The Court fees amount to £5. The following is the form of a creditor's petition:—

Form 5

Creditor's Petition

Usual Title.—Re A.B. (*the debtor*).
Ex parte C. D. [and E. F.] (*the creditor or creditors*).

I, *C. D.*, of ..... [*or* we, *C.D.*, of ..... and *E. F.*, of .....], hereby petition the Court that a receiving order may be made in respect of the estate of (*a*) ..... of (*b*) ..... and lately carrying on business at [*or* residing at] (*c*) ..... , and say:—

1. That the said *A. B.* has for the greater part of six months next preceding the presentation of this petition resided [*or* carried on business] at ..... within the district of this Court [*or, as the case may be, for a longer period during these six months, &c.*]. (See p. 102.)

2. That the said *A. B.* is justly and truly indebted to me [*or* us in the aggregate] in the sum of £ [*set out amount of debt or debts, and the consideration*].

3. That I [*or* we] do not, nor does any person on my [*or* our] behalf, hold any security on the said debtor's estate, or on any part thereof, for the payment of the said sum.

Or,

That I hold security for the payment of [*or* part of] the said sum [but that I will give up such security for the benefit of the creditors of *A. B.* in the event of his being adjudged bankrupt] [*or* and I estimate the value of such security at the sum of £]. (See p. 102.)

Or,

That I, *C. D.*, one of your petitioners, hold security for the payment of, &c.

That I, *E. F.*, another of your petitioners, hold security for the payment of, &c.

4. That *A. B.* within three months before the date of the presentation of this petition has committed the following act [*or* acts] of bankruptcy, namely [*here set out the nature and date or dates of the act or acts of bankruptcy relied on*].

Dated this ..... day of ....., 19.....

(*Signed*) C. D.
E. F.

[Signed by the petitioner in my presence.]
Signature of Witness .....
Address .....
Description .....

(*a*) Insert name of debtor.
(*b*) Insert present address and description of debtor.
(*c*) Insert address or addresses at which the debtor has lately resided or carried on business.

Note.—The address at which the debtor was residing or carrying on business when the petitioning creditor's debt was incurred should in all cases appear in the petition.

NOTE.—If there be more than one petitioner, and they do not sign together, the signature of each must be separately attested, e.g. "Signed by the petitioner *E. F.* in my presence". If the petition be signed by a firm, the partner signing should add also his own signature, e.g. "*A. S. & Co.* by *J. S.*, a partner in the said firm". If the debtor resides at any place other than the place where he carries on business, both addresses should be inserted.

Indorsement

This petition having been presented to the Court on the ..... day of ..... , 19....., it is ordered that this petition shall be heard at ..... on the ..... day of ....., 19....., at ..... o'clock in the .....noon.

And you, the said *A. B.*, are to take notice that if you intend to dispute the truth of any of the statements contained in the petition, you must file with the registrar of this Court a notice showing the grounds upon which you intend to dispute the same, and send by post a copy of the notice to the petitioner (three) days before the date fixed for the hearing.

Form 5(*a*)

Affidavit of Truth of Statements in Petition

(*Title*)

I, the petitioner named in the petition hereunto annexed, make oath [*if the petitioner declare or affirm, alter the form accordingly*] and say:—

1. That the several statements in the said petition are, within my own knowledge, true.

Sworn at, &c. C. D.

NOTE.—If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge, he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements.

At the hearing, usually eight days after service of the petition, the Court requires proof of the debts of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts. If intending to oppose, the debtor must give notice to the registrar in required form (Form 5*b*). If satisfied with the proof, the Court may make a receiving order in pursuance of the petition.

Form 5(*b*)

Notice by Debtor of intention to oppose Petition

(*Title*)

In the matter of a bankruptcy petition presented against me on the ..... day of ...., 19.. by *C. D.*, of ..... [*or* and *E. F.*, of ..... *G. H.*, of ..... &c.]

I, the above *A. B.*, do hereby give you notice that I intend to oppose the making of a receiving order as prayed, and that I intend to dispute the petitioning creditor's debt [*or* the act of bankruptcy, *or* as the case may be].

Dated this ..... day of .. .., 19... A. B.

To *C. D.*, of ....., and to ....., and to the Registrar of the said Court.

If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts or that for other sufficient cause no order ought to be made, the Court may dismiss the petition.

A petition presented by a firm must contain the full names of the partners, and, if presented in the firm's name, must be supported by an affidavit to the effect that all the partners concur.

What is sufficient cause why no order should be made depends in each case upon the circumstances; but if it is shown that bankruptcy proceedings are being used to extort money, or obtain an unfair advantage, the order may be refused. Where the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the petition may be dismissed on the ground that an appeal is pending.

Stay of Proceedings

Where the debtor appears, and denies that he is indebted or indebted to such an amount as would justify the petitioner in presenting a petition, the Court, on such security, if any, being given as is required for payment to the petitioner of any debt, which may be established, and costs, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question. Where such proceedings are stayed, the Court may, if by reason of the delay caused by such stay or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and thereupon dismiss the proceedings in the former petition.

Debtor's own Petition

A petition presented by the debtor himself must allege that he is unable to pay his debts, and the presentation is itself an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court thereupon makes a receiving order. No petition, after presentment, can be withdrawn without leave of the Court.

Form 6

Debtor's Petition

(*Title*)

I, (*a*) ..... lately residing at ..... [*and* carrying on business at (*b*) .....] having for the greater part of the past six months resided at .... [*and* carried on business at .....] within the district of the Court [*or, as the case may be, following the terms of Section* 95 (see p. 102)], and being unable to pay my debts, hereby petition the Court that a receiving order be made in respect of my estate [and that I may be adjudged bankrupt].

Dated the ..... day of ...., 19.....

(*Signature*) .....

[Signed by the debtor in my presence.]

Signature of Witness .....

Address .....

Description .....

Filed the ..... day of ....., 19.....

(*a*) Insert name, address, and description of debtor.

(*b*) Insert the other address or addresses at which unsatisfied debts or liabilities may have been incurred.

NOTE.—Where the debtor resides at a place other than his place of business, both addresses should be inserted.

Power of the Court

Two or more petitions may be consolidated by the Court; and if a petitioner does not proceed with due diligence, the Court may substitute any other creditor to whom the debtor may be indebted to the extent of £50. The Court has power to continue the proceedings against the estate of a debtor who has died, and in any case to stay proceedings on such terms and such conditions as may be just.

If it is shown to be necessary for the protection of the estate at any time after the presentation of the petition, and before a receiving order is made, the Court may appoint the official receiver to be interim receiver of the property of the debtor or any part, and direct him to take immediate possession, but not to realize. The Court may at any time after the presentation of the petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against the debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on terms. Where the Court makes an order staying any action or proceedings, the order may be served by sending a copy under the seal of the Court, by prepaid letter post, to the address for service of the plaintiff or other party prosecuting such proceeding.

An appeal must be entered within twenty-one days.

Making a Receiving Order

The form of a receiving order is as follows:—

Form 7

Receiving Order on Creditor's Petition

(*Title*)

Re A. B.
Ex parte C. D. (*a creditor*).

On the petition (dated the ..... day of ... ., 19..., and numbered ... . of 19 ..) of *C. D.*, of ..... a creditor filed the [*insert date*] and on reading .... and hearing ..... and it appearing to the Court that the following act or acts of bankruptcy has or have been committed, viz.:—

[*Set out the nature and date or dates of the act or acts of bankruptcy on which the Order is made.*]

A receiving order is hereby made against *A. B.* [*insert name, addresses, and descriptions of debtor as set out in petition*], and the official receiver [*or, Mr. X. Y.*, an Official Receiver] of this Court is hereby constituted receiver of the estate of the said debtor.

Dated this .... day of ... ., 19. ....

By the Court,

.... *Registrar.*

NOTE.—The above-named debtor is required, immediately after the service of this order upon him, to attend the Official Receiver of the Court at his offices at (*a*).

The Official Receiver's offices are open every weekday from 10 a.m. to 4 p.m., except .....days, when they close at .... . p.m.

(*a*) Insert the place at which the debtor is to attend on the official receiver.

Indorsement on Order

The name and address of the solicitor to the petitioning creditor are [*insert name and address*].

The immediate effect of the making of a receiving order against a debtor is that an official receiver is constituted receiver of the property of the debtor, and no creditor to whom the debtor is indebted in respect of any debt provable in the bankruptcy has, with the exceptions allowed by the Act, any remedy against the property or person of the debtor in respect of the debt. Such a creditor can only commence an action or other legal proceeding with the special leave of the Court. Secured creditors may, however, realize or otherwise deal with their security notwithstanding.

The Court has power to review, rescind, or vary any order made by it under its bankruptcy jurisdiction.

In other cases where the debts are not paid in full, if the debtor has not been guilty of misconduct, the Court may have in its discretion power to rescind the receiving order; but generally the consent of the creditors is not sufficient; the general public interest must be regarded.

Attendance of the Debtor

It will be noticed that at the foot of the receiving order the debtor is directed to wait upon the Official Receiver at a certain place and time. At this interview he will be subjected to searching questions, according to an official code, and it must then become evident to the smartest or most evasive debtor that it will be best to make a full disclosure of his affairs.

Public Notice

A copy of every receiving order is sent by the Registrar to the Official Receiver, and by him served on the debtor. Notice is given to the Board of Trade.

The making of a receiving order is at once advertised. The name, address, and description of the debtor, date of the order, Court by which it is made, and date of the petition, are gazetted and advertised in the local paper.

Special Manager

In cases where the nature of the debtor's estate or business, or the interests of the creditors generally, require the appointment of a special manager other than the official receiver, on the application of any creditor or creditors, the official receiver may appoint a special manager to act until the trustee is appointed with such powers as may be entrusted to him by the official receiver. A special manager must give security and account in such manner as the Board of Trade may direct, and he receives such remuneration as the creditors may determine by resolution at an ordinary meeting, or as may be otherwise prescribed.

The Receiving Order and its Effect

If the majority of the creditors in number and value are resident in Scotland or in Ireland, and if it appears, from the situation of the property or other causes, that the estate and effects ought to be administered under the law of Scotland or Ireland, the Court may rescind the receiving order and stay all proceedings, or dismiss the petition in terms.

It does not necessarily follow on the issue of a receiving order that a debtor is made a bankrupt. The creditors may accept a composition or scheme of arrangement which may avoid bankruptcy, and, even after the debtor has been adjudicated bankrupt, such a composition or scheme may be accepted and the bankruptcy may be annulled.

Statement of Affairs

Immediately after the receiving order is made certain steps must be taken. The debtor must make out and submit to the official receiver a statement of his affairs in the prescribed form, verified by affidavit. This statement, of which the debtor should keep a copy, must be submitted within three days of the date of the order made on the petition of the debtor himself, or within seven days of the date of the order on the petition of a creditor. The time may be extended by the Court for special reasons. The form of the statement of affairs is sent to the debtor, and is as given on p. 108.

If the debtor fails, without reasonable excuse, to comply with these requirements, the Court may adjudge him bankrupt. Any person stating himself in writing to be a creditor of the bankrupt may, personally or by agent, inspect this statement at all reasonable times, and copy it or make extracts from it; but a person untruthfully representing himself to be a creditor is punishable as for a contempt of Court. If the estate is a complicated one, and the debtor cannot himself prepare a proper statement of affairs, the official receiver may employ assistance.

Public Examination

It is very seldom that a debtor, after a receiving order is made, is able to avoid the public examination, as the Court at once proceeds to appoint a day when he must attend to be examined as to his conduct, dealings, and property. This examination is held as soon as possible after the expiration of the time for the submission of the debtor's statement of affairs, and may be adjourned from time to time. Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor as to his affairs and his failure. The official receiver takes part in the examination, and, if specially authorized by the Board of Trade, may employ a solicitor, with or without counsel; but model sets of questions are supplied by the Board. As soon as the trustee is appointed, he may also take part in the examination. The debtor is also examined by the Court. He may have legal assistance. The debtor's answers are upon oath. Notes of his examination are taken down in writing and read over and signed by him. They may afterwards be used in evidence against him, but not against other persons, and are open to the inspection of any creditor at reasonable times.

When the Court is of opinion that the affairs of the debtor have been sufficiently investigated,

Form 8

Statement of Affairs

(*Title*)

To the Debtor.—You are required to fill up, carefully and accurately, this sheet, and the several sheets A, B, C, D, E, F, G, H, I, J, and K, showing the state of your affairs on the day on which the Receiving Order was made against you, viz. the ..... day of .....

Such sheets, when filled up, will constitute your statement of affairs, and must be verified by oath or declaration.

Gross Liabilities. £ s. d	Liabilities (as stated and estimated by Debtor)	£ s. d.	Expected to Rank £ s. d.	Assets (as stated and estimated by Debtor).	£ s. d.	Estimated to Produce £ s. d.
	Unsecured creditors, as per list (A.) ..			Property, as per list (H.) viz.:—		
	Creditors fully secured, as per list (B.)			(*a*) Cash at bankers		
	Estimated value of securities			(*b*) Cash in hand		
	Surplus—			(*c*) Cash deposited with solicitor for costs of petition		
	Less amount thereof carried to sheet (C.)			(*d*) Stock in trade (cost £)		
	Balance thereof to contra .			(*e*) Machinery		
	Creditors partly secured, as per list (C.) .			(*f*) Trade fixtures, fittings, utensils, &c.		
	Less estimated value of securities			(*g*) Farming stock		
	Liabilities on bills discounted other than debtors' own acceptances for value, as per list (D.), viz.:—			(*h*) Growing crops and tenant right ...		
	On accommodation bills as drawer, acceptor, or indorser £ : :			(*i*) Furniture		
	On other bills as drawer or indorser .. ... . : :			(*j*) Life policies		
	£ : :			(*k*) Other property, viz.:—		
	Of which it is expected will rank against the estate for dividend			Total as per list (H.)		
	Contingent or other liabilities, as per list (E.) .. . £ : :			Book debts, as per list (I.), viz.:—		
	Of which it is expected will rank against the estate for dividend			Good		
	Creditors for rent, &c., recoverable by distress, as per list (F.)	£ s. d		Doubtful	£ s. d.	
	Creditors for rates, taxes, wages, &c., payable in full, as per list (G.)			Bad		
	Sheriff's charges payable under S. 11 of the Bankruptcy Act, 1890, estimated at ...			Estimated to produce		
	Deducted contra ...			Bills of exchange or other similar securities on hand, as per list (J.) .. .. £ : :		
		£		Estimated to produce		
				Surplus from securities in the hands of creditors fully secured (per contra) ...		
				£		
				Deduct creditors for distrainable rent, and for preferential rates, taxes, wages, sheriff's charges, &c. (per contra) ...		
				£		
				Deficiency explained in statement (K.)...		
£		£		£		

I, ... of ..... make oath and say that the above statement and the several lists hereunto annexed marked A, B, C, D, E, F, G, H, I, J, K, are to the best of my knowledge and belief a full, true, and complete statement of my affairs on the date of the above-mentioned Receiving Order made against me.

Sworn at ..... in the County of ..... this .....
day of ....., 19..., before me .....

(*Signature*)

The accompanying sheets must be filled up with the particulars demanded and returned with this form:—

A. Gives a list of unsecured creditors. B. Creditors fully secured. C. Creditors partly secured. D. Liabilities of debtor on bills discounted, other than his own acceptances for value. E. Contingent on other liabilities.

F. Creditors for rent, &c., recoverable by distress. G. Preferential creditors for rates, taxes, and wages. H. Property [full particulars of every description, e.g. cash at bankers, cash in hand, cash deposited with solicitor for costs of petition, stock-in-trade at (cost £), machinery, trade fixtures, &c., household furniture, life policies, other property, &c.]; each item estimated to produce £ . I. Debts due to the estate (stating, in the case of debtors being also creditors *for less amount than the indebtedness*, the gross amount due and the contra account). No such claim should be included in Sheet A. J. Bills of exchange, promissory notes, &c., available as assets. K. Deficiency account. Each sheet must be signed and dated by the debtor.

it declares the examination concluded; but such an order is not made until after the day of the first meeting of creditors.

For the purpose of approving a composition or scheme by joint debtors, the public examination of one of such joint debtors, if he is unavoidably prevented from attending by illness or absence abroad, may be dispensed with by the Court. The public examination may also be dispensed with by the Court and the debtor examined in some other manner, where the debtor is a lunatic, or suffers from any such mental or physical affliction or disability as makes him unfit to attend a public examination; or in the exceptional cases where the receiving order is rescinded.

Meetings of Creditors

Not later than fourteen days after the date of the receiving order, unless the Court otherwise directs, the first meeting of creditors is held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor should be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property. The meeting is summoned by the official receiver by seven days' notice in the London Gazette and in a local paper, and by sending a notice to each creditor mentioned in the debtor's statement, with a summary of the statement of affairs and his own observations. The debtor must attend. The official receiver or his nominee presides at the first meeting, and at subsequent meetings the chairman who is appointed by the meeting. A creditor cannot vote at a meeting unless he has duly proved a debt provable in bankruptcy, and duly lodged the proof before the meeting; and secured creditors only vote in respect to their balance due. Subsequent meetings of creditors may be called at the request of a creditor with the concurrence of one-sixth in value of the creditors, and upon a deposit of the necessary costs. Proxies may be used (Form 12), but a person must not canvass for them, or in any other way seek to obtain the trusteeship. Minutes are kept, and the meeting is generally controlled by the chairman.

Composition or Scheme of Arrangement

At an early stage the creditors may decide to accept any reasonable scheme which has been put forward by the debtor without proceeding to bankruptcy. A debtor who intends to make a proposal for a composition in satisfaction of his debts, or for a scheme of arrangement of his affairs, must, within four days of submitting his statement of affairs, or within such other time as the official receiver may fix, lodge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme which he is desirous of submitting to the creditors, and setting out particulars of any sureties or securities proposed. These proposals are in the following form:—

Form 9

Form of Proposal for a Composition

(*Title*)

I, *A. B.*, the above-named debtor, hereby submit the following proposal for a composition in satisfaction of my debts:—

1. That payment in priority to all other of my debts of all debts directed to be so paid in the distribution of the property of a bankrupt shall be provided for as follows:—

(*Set out terms of proposal so far as they relate to preferential claims.*)

2. That provision for payment of all the proper costs, charges, and expenses of and incidental to the proceedings, and all fees and percentages payable to the official receiver and the Board of Trade, shall be made in the following manner:—

(*Set out proposal for providing fees, charges, costs, &c.*)

3. That the following composition shall be paid as hereinafter mentioned on all provable debts.

(*Set out terms of composition.*)

4. That the payment of the composition be secured in the following manner:—

(*Set out full names and addresses of sureties (if any), and complete particulars of all securities intended to be given.*)

Dated this ..... day of ....., 19...

(*Signed*) .....
(Debtor or firm.)

Form 10

Form of Proposal for a Scheme of Arrangement

(*Title*)

I, *A. B.*, the above-named debtor, hereby submit the following proposal for a scheme of arrangement of my affairs in satisfaction of my debts:—

1. That (*set out terms of scheme*).

2. That payment in priority to all other of my debts of all debts directed to be so paid in the distribution of the property of a bankrupt is provided for as follows:—

(*Set out or indicate by reference to the scheme how it is proposed to satisfy preferential claims.*)

3. That provision for payment of all the proper costs, charges, and expenses of and incidental to the proceedings, and all fees and percentages payable to the official receiver and the Board of Trade, is provided for as follows:—

(*Set out or indicate by reference to the scheme how it is proposed to provide for fees, costs, charges, &c.*)

(*Set out any other terms.*)

Dated this .. . day of ....., 19...

(*Signed*) ... .
(Debtor or firm.)

Form 11

Resolution accepting Composition

(*Title*)

Minutes of resolutions come to and proceedings had at a meeting of creditors held at ..... this ..... day of ... ., 19.... ....., Chairman.

Resolved as follows [unanimously]:

That the debtor's proposal for a composition, as set forth in the annexed paper writing, marked "A", be accepted.

[If the official receiver is not to be the trustee for the purpose of receiving and distributing the composition, add here resolutions appointing a trustee and fixing his remuneration. F. K., *Chairman.*

Number	Assenting Creditors' Signatures.	Amount of Proof	Number.	Dissenting Creditors' Signatures.	Amount of Proof.

NOTE.—When a resolution is carried unanimously the creditors need not sign, but when a division is taken all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately.

Form 12

General Proxy

(*Title*)

I, *C. D.*, of ....., a creditor, hereby appoint [the official receiver in the above matter *or Mr. A. B.*, of ....., a clerk in my regular employ] to be my general proxy in the above matter [excepting as to the receipt of dividend].

Dated this ..... day of ...., 19.... .

(*Signed*) C. D.

Signature of Witness ....

Address ....

Notes

(1) When the creditor desires that his general proxy should receive dividends, he should strike out the words "excepting as to the receipt of dividend", putting his initials thereto. It is not intended that the official receiver shall in any case receive dividends on behalf of a creditor.

(2) The authorized agent of a corporation may fill up blanks and sign for the corporation, e.g. for the ..... company.

J. S. (duly authorized under the seal of the company).

(3) A proxy given by a creditor may be filled up and signed by any person having a general authority in writing to sign for such creditor Such person shall sign:—

J. S. [duly authorized by a general authority in writing to sign on behalf of (*name of creditor*)] (*a*).

(*a*) The official receiver or trustee may require the authority to sign to be produced for his inspection.

The official receiver then holds a meeting of creditors before the public examination of the debtor is concluded, and sends to each creditor before the meeting a copy of the debtor's proposal with his report thereon. If at that meeting *a majority in number and three-fourths in value*

of all the creditors who have proved resolve to accept the proposal, the proposal is deemed to be duly accepted by the creditors, and when approved by the Court is binding on all the creditors (Form 11). At the meeting the debtor may amend the terms of his proposal if, in the opinion of the official receiver, the amendment is calculated to benefit the general body of creditors. Any creditor who has proved his debt may, without attending the meeting, assent to or dissent from the proposal by letter in the prescribed form sent to the official receiver so as to reach him not later than the day before the meeting.

After the proposal has been accepted by the creditors the debtor or the official receiver may apply to the Court to approve it, three days' notice of such application being given to each creditor who has proved. The application is not to be made until after the conclusion of the public examination. Any creditor who has proved may be heard in opposition to the application, although he may have voted for the acceptance of the proposal. The Court, before approving the proposal, hears a report of the official receiver, filed four days before, as to its terms, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

The Court may refuse to approve a proposal if, in its opinion, the terms are not reasonable or calculated to benefit the general body of creditors, or in any case in which the Court is required, where the debtor is adjudged bankrupt, to refuse his discharge (see p. 126). If any facts are proved on proof of which the Court would be required to refuse, suspend, or attach conditions to a debtor's discharge were he adjudged bankrupt, the Court must refuse to approve a proposal unless it provides reasonable security for payment of not less than 7*s.* 6*d.* in the £1 on all the unsecured debts at that time provable against the estate. The Court has, in addition, a general discretion as to approval or disapproval.

After the composition or scheme is approved by the Court, it is binding on all the creditors in regard to all debts, with the exception that it does not release a liability under a judgment in an action for seduction, an affiliation order, or under a judgment against a co-respondent in a matrimonial cause, except in so far as the Court may specially order.

Notwithstanding the acceptance and approval of a composition or scheme, such composition or scheme is not binding on any creditor so far as regards a debt or liability from which the debtor would not be discharged by an order of discharge from bankruptcy, unless the creditor assents to the composition or scheme.

No composition or scheme will be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt (see as to "Preferential Claims", p. 121). The acceptance by a creditor of a composition or scheme does not release any person who would not be released by an order of discharge if the debtor had been adjudged bankrupt.

When a composition or scheme is accepted and approved it may be enforced by the Court on the application of any person interested, and any disobedience to such an order is contempt of Court. If default is made in payment of any instalment due under the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, on the application of the official receiver or the trustee or any creditor, adjudge the debtor bankrupt and annul the composition or scheme. Such annulment would, however, be without prejudice to the validity of any sale or payment duly made or thing duly done under the composition or scheme. Where the bankrupt is adjudged bankrupt in this way, any debt provable in other respects which has been contracted before the adjudication is provable in the bankruptcy. A trustee under a scheme is accountable to the Board of Trade.

THE ADJUDICATION OF BANKRUPTCY

In circumstances where a scheme or composition is not offered or accepted, bankruptcy ensues. If the creditors at the first meeting, or any adjourned meeting, by resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved within fourteen days after the conclusion of the examination of the debtor, or within such further time as the Court may allow, then the Court will adjudge the debtor, or each member of the firm of debtors, bankrupt (Form 13). Thereupon the property of the bankrupt vests in a trustee, and becomes divisible among his creditors. The adjudication is then advertised. The name, address, and description of the bankrupt, the debt, and the Court of adjudication are gazetted and advertised in a local paper in the manner prescribed.

Form 13

Order of Adjudication

(*Title*)

Pursuant to a petition, dated ..... against [*here insert name, description, and address of debtor*] on which a receiving order was made, on the [*date*], and on the application of [*here insert "the official receiver" or "the debtor himself", or "A. B. of ..... a creditor"*], and on reading ..... and hearing ..... it is ordered that the debtor be and the said debtor is hereby adjudged bankrupt.

Dated this ..... day of ....., 19...

By the Court,

..... *Registrar.*

Or,

Whereas pursuant to a petition dated .... against *A. B.*, a receiving order was made on the [*date*]. And whereas it appears to the Court that at the first meeting of creditors held on the [*date*] (or at an adjournment of the first meeting of creditors), at ....., it was duly resolved that the debtor be adjudged bankrupt. It is ordered that the debtor be and the said debtor is hereby adjudged bankrupt.

Dated this ..... day of ..... 19...

By the Court,

..... *Registrar.*

Appointment of Trustee

Where a debtor is adjudged bankrupt, or the creditors have resolved upon adjudication, the creditors may appoint some fit person, whether a creditor or not, to act as trustee of the bankrupt's property, or they may leave the appointment to the committee of inspection, or the official receiver may, as is common, be left as trustee. The person appointed must give security to the satisfaction of the Board of Trade—generally secured by Fidelity guarantee (see Chapter VIII of this Part)—and the Board certifies that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or on the ground of personal unfitness or unsuitability in regard to relationship with the debtor. In the latter case, the High Court may be called upon to decide as to the validity of the objection. A person who has been previously removed from the office of trustee of a bankrupt's property for misconduct or neglect of duty is *ipso facto* unfitted to act in this capacity, and generally where a person's duties and interests are likely to come into conflict, his appointment will not be justified.

If a trustee is not appointed by the creditors within four weeks of the date of the adjudication, or, in the event of negotiations for a composition or scheme being pending, at the expiration of those four weeks, then within seven days of the close of those negotiations, the official receiver reports the matter to the Board of Trade, and the Board of Trade appoints a trustee of the bankrupt's property. The creditors or committee of inspection authorized by the creditors may, at any subsequent date, appoint a trustee, and when the appointment is made and certified, the trustee appointed by the Board of Trade is suspended.

When a debtor is adjudged bankrupt after the first meeting of creditors has been held, and a trustee has not been appointed prior to the adjudication, the official receiver forthwith summons a meeting of creditors for the purpose of appointing a trustee.

Committee of Inspection

The creditors, qualified to vote, at the first or any subsequent meeting may appoint from among such creditors or the holders of general proxies or general powers of attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the bankrupt's property. The committee consists of not more than five, nor less than three persons, and members must first have proved their debt, and the proof must have been admitted. The committee of inspection meets at times appointed, or at least once a month, and is unpaid. The trustee or any member may call a meeting as and when he thinks necessary. The majority of the members must be present to form a meeting, and meetings are then governed by the majority present. Any member may resign by notice in writing delivered to the trustee. The office becomes vacant if any member becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee. A member may be removed by an ordinary resolution of any meeting of creditors, of which seven days' notice has been given, stating the object of the meeting. When a vacancy occurs, the trustee summons a meeting of the creditors with the object of filling the vacancy. The continuing members, not being less than two, may act notwithstanding any vacancy, and the creditors may always increase the number of the committee so that the number shall not exceed five. If there is no committee of inspection, the Board of Trade may exercise any powers of the committee on the application of the trustee.

Composition or Scheme of Arrangement after Adjudication

A possible result may be the acceptance of a composition or scheme *after* the adjudication of the bankruptcy has taken place, which adjudication will then be annulled. The creditors, if they think fit at any time after the adjudication, may, by special resolution, passed by a majority in number and three-fourths in value of all the creditors who have proved, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs. Thereupon the same proceedings are taken, and the same consequences ensue as in the case of a composition or scheme accepted before adjudication (see p. 111).

Bankruptcy Annulled

If the Court approves the composition or scheme, it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint on such terms and subject to such conditions, if any, as the Court may declare. If default is made in payment of any instalment due under the composition or scheme, or if the Court thinks the composition or scheme cannot proceed without injustice or undue delay, or if the approval of the Court was obtained by fraud, the debtor may be adjudged bankrupt and a composition or scheme annulled, with the same consequences as in the former case (see p. 111).

The Court may, at discretion, and if the bankrupt's conduct has been good, annul the adjudication in two other cases: where, in the opinion of the Court, the debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that a bankrupt's debts are paid in full, on the application of any person interested the adjudication may be annulled. In this case, also, all sales and dispositions of property and payments duly made, and acts duly done by the official receiver, trustee, or other authorized person, or by the Court, are valid, but the property of the debtor vests in such person as the Court appoints, or reverts to the debtor on terms.

In this connection any debt disputed by a debtor is considered as paid in full if the debtor enters into a bond for such sum and with such sureties as the Court approves, to pay the amount recovered in any proceeding for the recovery of or concerning the debt, with costs; and any debt due to a creditor who cannot be found or identified is considered as paid in full, if paid into Court.

Notice of the order annulling adjudication is gazetted and advertised locally.

PROPERTY DIVISIBLE AMONGST CREDITORS AND ITS ADMINISTRATION

Before considering the various classes of property which, on an adjudication, vest in the trustee in bankruptcy for the benefit of creditors, it may be well to consider the powers which the Court has of control over the person and property of the debtor.

Control over the Debtor

As we have seen, the debtor must have a frank interview with the official receiver, furnish a statement of affairs, attend meetings of his creditors, and submit to such examination and give such information as is required. He must wait at such other times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, or other documents, and generally do all such acts and things in relation to his property, and the distribution of the proceeds amongst his creditors as may be reasonably required. If adjudged bankrupt, the debtor must aid, to the utmost of his power, in the realization and distribution of his property amongst the creditors.

If a debtor wilfully fails to perform any of these duties, or to deliver up possession of any part of the property which is divisible amongst his creditors, in addition to any other punishment he may be subject to, he may be punished for contempt of Court.

The Court may cause a debtor to be arrested, and any books, papers, money, and goods in his possession to be seized:

(*a*) If, after a bankruptcy notice has been issued, or a bankruptcy petition presented, it appears to the Court that there is probable reason for believing that he has absconded or is about to abscond with a view to avoiding payment of the debt, or service of a bankruptcy petition, or appearance to such petition, or examination as to his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy;

(*b*) If, after presentation of a bankruptcy petition, it appears to the Court that there is probable cause for believing that he is about to remove his goods with a view to preventing or delaying possession being taken of them by the official

receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents, &c., which might be of use to his creditors;

(*c*) If, after service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession above the value of £5 without the leave of the official receiver or trustee;

(*d*) If, without good cause shown, he fails to attend any examination ordered by the Court.

But no arrest upon a bankruptcy notice is valid and protected unless the debtor before or at the time of his arrest is served with such bankruptcy notice. No payment or composition made or security given after such an arrest is exempt from the provisions of the Act relating to fraudulent preference (see p. 117).

Enquiries as to Property

Where a receiving order is made, the official receiver is put in possession of the debtor's correspondence. The Court may direct from time to time, not exceeding three months, that post letters addressed to the debtor at any place may be redirected, sent, or delivered by the post office to the official receiver or the trustee, or otherwise as the Court directs.

At any time after a receiving order has been made against a debtor, the Court may summon before it the debtor, or his wife, or any other person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person deemed capable of giving information respecting the debtor, his dealings or property; and the Court may require from such person the production of any document relating to the debtor's affairs. Any person refusing to come before the Court, or to produce any such document, after reasonable conduct money has been rendered, may be apprehended. Such person may be examined on oath. If he admits that he is indebted to the debtor, he may be ordered to make payment to the official receiver or trustee. Similarly, any person may be ordered to hand over to the official receiver or trustee any property belonging to the debtor.

Relation Back of Trustee's Title

It is provided that where bankruptcy ensues, whether it takes place on the debtor's own petition or that of a creditor or creditors, the bankruptcy shall be deemed *to have relation back to, and commence at, the time of the act of bankruptcy being committed on which a receiving order is made;* or, if the bankrupt is proved to have committed more acts of bankruptcy than one, the bankruptcy relates back to, and commences at, the time of the first of such acts proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the petition. But no bankruptcy petition, receiving order, or adjudication is rendered invalid by reason of any act of bankruptcy anterior to the date of the petitioning creditor. In other words, where a person is adjudicated bankrupt, his property will become divisible amongst his creditors as from the date when he committed the act of bankruptcy, or the first of a series of acts, within three months before the petition is presented.

Where a receiving order is made against a judgment debtor, the bankruptcy of the debtor relates back to, and commences at, the time of the order; or, if the bankrupt is proved to have committed any previous act of bankruptcy, to the first of the acts of bankruptcy proved to have been committed by him within three months next preceding the date of the order.

There are two exceptions to the rule as to relation back of the title of the trustee, viz. a completed execution or attachment before the receiving order, and a *bona fide* transaction with a person giving valuable consideration and without knowledge of the available act of bankruptcy (see pp. 117, 118).

This doctrine of "relation back" is of vital importance to those who have dealings with debtors in difficulties. It may place them in the position of having to refund money received or forgo a charge given. Even a payment for professional services, as to a solicitor for defence, is only good as far as it is actually set off by services rendered at the time of bankruptcy.

Property not Divisible amongst Creditors

It is provided that two classes of property shall not be included in that divisible amongst the creditors. The first is property held by the bankrupt on trust for any other person, and the second the tools, if any, of his trade, and the necessary wearing apparel and bedding of himself, his wife, and children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole.

Trust Property

With regard to property held on trust, it must be sufficient to point out that this does not merely

mean property on express trust, of which the bankrupt, is, as commonly well understood, the trustee for some other person or persons under a will or other settlement, or as executor or administrator. The term trust will also apply to property the beneficial interest in which, by the act of the bankrupt, has passed to another person; in other words, where there has been an equitable assignment.

An order by one person to another who is his debtor to pay a sum over to a third person out of funds in his hands creates an equitable assignment in favour of the third person—so long as there is a definite fund in hand or due to meet the demand.

It is essential, however, that the direction to pay should be communicated to the creditor before the assignment is complete. In practice the creditor will also give notice to the holder of the fund, so as to obtain priority and prevent the fund being held to be in the reputed ownership of his debtor, should he become bankrupt.

There is an exceptional case established under case law (known as the rule in *ex parte Waring*, 1815) and confined to bills of exchange, in which, even without this communication to the creditor by the debtor, an equitable assignment is effected. Where property has been deposited by one party liable, whether as acceptor, drawer, or otherwise, on bills of exchange not yet due, in the hands of another also liable, in order to meet the bills, and both parties become bankrupt or insolvent before the bills become due or are paid, the holders of the bills are entitled to have the money applied in payment of them, though they were ignorant at the time of the deposit. There must be the double insolvency and right of double proof for this peculiar rule to apply. In such bankruptcies, these deposited funds would therefore be subject to a trust.

There is also a trust where the bankrupt holds property merely as factor or agent, so long as it is distinguishable from his own property, but it is subject to any lien of the bankrupt or trustee for debts due to the estate. (See also Chapter II of this Part.)

Property which is Divisible amongst Creditors

With these chief exceptions property divisible amongst creditors is classified as follows:—

1. All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

2. The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice.

3. All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.

"Property" includes money, goods, things in action, and every description of real or personal property, whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

Property belonging to the Bankrupt

The first class of property which becomes divisible among the creditors is, as we have just seen, all which belongs to or is vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge. This is the class which is the commonest, and calls for little explanation. It is itself, however, subject to some exceptions or apparent exceptions:—

1. Goods which have been sold to the bankrupt, but which have not come into the actual or constructive possession of the buyer when he becomes insolvent, may be stopped in transit by the seller under the law relating to the sale of goods. (See Chapter VI of this Part.)

2. Certain personal rights of action to recover damages do not pass to the trustee, as a right of action for slander, or personal injuries suffered in a street accident.

3. Although after-acquired property devolves upon the trustee, wages earned by the mere personal labour of the bankrupt which are no more than reasonably necessary to keep himself and his family do not pass. The profits of a business, however, which he continues to carry on, even though demanding his personal skill, become available for the creditors; as do, in general, his personal, or professional, or business earnings.

Property acquired after his bankruptcy and before his discharge by a bankrupt does not, however, vest absolutely in the trustee, and, unless the trustee intervenes, the bankrupt may deal with it; and until the trustee intervenes, all *bona fide* transactions of the bankrupt for value with regard to such after-acquired property are valid, except as regards real estate, which does not include lease-

holds. Real estate cannot be conveyed by the bankrupt.

4. A person may be in possession of income on terms which the bankruptcy itself affects. Income may be left by others to a man until he becomes bankrupt, in which case bankruptcy determines his interest, and nothing is available for creditors. It is necessary that the income should have been settled on him by others. A man cannot anticipate his own bankruptcy by settling property on himself which, on his bankruptcy, shall go over to others.

5. Under the rules of the London Stock Exchange, contracts made by a defaulting member for the next settling-day for purchase and sale of stocks and shares are closed by the official assignee of the Stock Exchange at the market prices at the time of the default. The members from whom differences are due on the contract pay them to the official assignee, who pays those members to whom differences are due (see Part IV). This is a voluntary fund formed under the rules of the house, and the trustee in bankruptcy is not entitled to it, as he would be to any portion of the defaulter's private assets if the latter handed them to the official assignee.

6. Certain classes of property in the nature of stipends, pensions, and salaries may be partially available for distribution amongst creditors under certain rules. Where the bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice. The bishop of the diocese may, if he thinks fit, appoint to the bankrupt such stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident, and the sequestrator pays this sum out of the profits of the benefice to the bankrupt by quarterly instalments while he performs the duties of the benefice. Payment is also provided for out of the profits to any curate in respect of duties performed by him during four months preceding the date of the receiving order, not exceeding £50.

Where the bankrupt is an officer in the Army or Navy, or an officer or clerk, or otherwise employed in the Civil Service of the Crown, the trustee receives for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Where a bankrupt is in receipt of salary or income otherwise, or is entitled to any half-pay or pension, or any compensation granted by the Treasury, the Court may, from time to time, make an order as to payments out of the salary or other receipts, to be applied as the Court may direct. This rule is subject to any power there may be in the public department to dismiss the bankrupt or declare the half-pay, pension, or compensation forfeited.

"Reputed Ownership"

Goods which at the commencement of the bankruptcy are in the possession, order, or disposition of the bankrupt *in his trade or business* by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, are amongst the property divisible among the creditors. The term "goods" does not include land, fixtures, anything in the nature of rights of action, shares, or stock, except debts due or growing due in the course of the bankrupt's trade or business. The goods must be in the possession of the bankrupt in connection with his trade or business, and he must be the apparent owner in sole possession; and the real owner must have consented to the apparent ownership. The rule is due to the fact that by the act of the true owner the bankrupt has been able to hold himself out as the owner of goods, and thereby obtain credit. While it is essential that the bankrupt should be in possession of the goods with the reputation of being their owner, this reputed ownership is always a question of fact, depending on the circumstances of each case. Not only special circumstances, but usage of trade may exclude the inference of ownership, as in the case of hotel proprietors who are known to use hired furniture. A general warehouseman may have goods of other people on his premises, without any "reputed ownership" attaching to them. But a custom of trade must be well known and established. If goods are not in the hands of the bankrupt but in those of his agent, the owner should, immediately on the bankruptcy, give notice to the agent; and an assignee of book debts due to the bankrupt should protect himself by immediate notice to the debtors. The true owner may protect himself by obtaining possession of the goods before the receiving order, or he is entitled if he has demanded them before he received notice of an available act of bankruptcy, and before the receiving order. A bill of exchange accepted by a debtor to a bankrupt, however, as a negotiable instrument, is an assignment of the debt.

There is nothing in the Bills of Sale Act which relieves a grantee from taking steps to negative reputation of ownership in the person with possession. Registration of conditional Bills of Sale does not exclude reputed ownership. (See also Chapter XII of this Part.) As to the disclaimer of onerous property, see p. 125.

Voluntary Settlements

Not only is property available which is in the possession of the bankrupt at the time, but in certain cases settlements made by him can be set aside and the property so settled be made available for distribution amongst creditors. Such a settlement must have been a voluntary one, that is, it must not have been made before and in consideration of marriage or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or be a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife. In other cases, if the settlor becomes bankrupt within two years after the date of the settlement, the settlement will be void against the trustee in bankruptcy; and if the settlor becomes bankrupt within ten years after the date of the settlement, it will be void against the trustee in bankruptcy unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on its execution.

Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, on the commencement of his bankruptcy, before the money or property has been actually transferred or paid pursuant to the contract or covenant, is void against the trustee in bankruptcy. Settlement in this connection includes any conveyance or transfer of property, but the settlement must be of property with the intention of preserving it. A gift of money to enable a relative to go into business is not such a settlement; but a gift of jewels by a husband to a wife may be so.

Such a settlement is voidable and not absolutely void, and persons *bona fide* purchasing or advancing money without notice of the voluntary settlement may obtain a good title in the interim; and the settlement is only avoided from the date of the trustee's title, and to the extent necessary to satisfy the bankrupt's creditors.

Fraudulent Preference

In order that the property of a bankrupt shall be equitably distributed, the law has made it impossible for a debtor, anticipating his difficulties, to give within a certain limited time a preference to one or more of his creditors over the general body. If such a preference is given within three months previous to the adjudication, the transaction will be set aside as fraudulent.

Every conveyance or transfer of property or charge made, every payment made, every obligation incurred, or every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, is, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, deemed fraudulent and void as against the trustee in bankruptcy. This does not, however, affect the rights of any person making title in good faith and for a valuable consideration through or under a creditor of the bankrupt.

The word preference is used as if it were the act of the debtor, but the preference may be induced by the act of a creditor who well knows the position, in which case payment will be equally set aside. But, on the other hand, payment may be made on account of *bona fide* pressure on the part of one of the creditors who does not then know the position of affairs. The trustee may, in that case, have a difficulty in proving—for the onus is upon him—that there was any preferential payment. Many cases may arise in which quite fairly one creditor has obtained an advantage by a payment of his debt before bankruptcy proceedings without any fraudulent preference. As has been seen, a fraudulent preference is in itself an act of bankruptcy (p. 101).

Judgment Debts

Certain other antecedent transactions may be affected by the bankruptcy. Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he is not entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy against the debtor. In this connection an execution against goods is completed by seizure and sale, and attachment of the debt by the receipt of the debt; and an execution against land by

seizure, or, in the case of an equitable interest, by the appointment of a receiver.

Where any goods of a debtor are in the hands of the sheriff before the sale or completion of the execution, if notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff must, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs are a first charge on the goods or money so delivered. Under an execution in respect of a judgment for an amount exceeding £20, if the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff must deduct his costs and retain the balance for fourteen days. If within that time notice is served on him of a bankruptcy petition, and a receiving order is made against the debtor, the sheriff must pay the balance to the official receiver or the trustee, who is entitled to retain it against the execution creditor.

An execution is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff in all cases acquires a good title against the trustee in bankruptcy.

Protected Transactions

Subject to what has been said, certain transactions which take place before the date of the receiving order, but after an available act of bankruptcy, are protected. These are: (*a*) Any payment by the bankrupt to any of his creditors; (*b*) any payment or delivery to the bankrupt; (*c*) any conveyance or assignment by the bankrupt for valuable consideration; (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that in each case both the following conditions are complied with:—(1) The transaction must have taken place before the date of the receiving order; and (2) the person (other than the debtor) with whom the transaction is made must not have had notice at the time of any available act of bankruptcy committed by the bankrupt before that time. Such person must be prepared to prove that he had no notice either of the actual fact or of facts which should lead him to infer that an act of bankruptcy had been committed. The protected transaction is only one which has been completed before the date of the receiving order. Payment made after the date of the receiving order in fulfilment of a contract made before is not protected.

Realization of the Property

It is the duty of the trustee as soon as possible to take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of delivery. For the purpose of acquiring or retaining possession of the bankrupt's property, the trustee is in the same position as if he had been appointed receiver by the High Court.

Where any part of the property consists of stock, shares in ships, shares or any other property transferable on the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it. Where any part of the property is of copyhold, customary tenure, or the like, the trustee need not be admitted to the property, but he may deal with it as if he had been admitted. Any part of the property consisting of things in action is deemed to have been duly assigned to the trustee. Any treasurer or other officer, or any banker or agent of the bankrupt must pay and deliver to the trustee all money and securities of the bankrupt in his possession or power which he is not by law entitled to retain as against the bankrupt or trustee, otherwise he is guilty of contempt of Court.

Any person acting under warrant of the Court may seize any part of the property of the bankrupt in his custody or possession, or of that of any other person, and for that purpose may break into any premises, or the Court may grant a search warrant if property is suspected to be concealed.

The official receiver, as interim trustee, is invested with the property of the bankrupt, and on the appointment of a trustee the property forthwith passes to and vests in him. Property passes from trustee to trustee during the continuance in office of each without any conveyance, assignment, or transfer, and the certificate of appointment of a trustee is for all purposes throughout the British dominions deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly. The general powers and duties of the trustee are discussed later (see p. 125).

PROOF OF DEBTS AND PAYMENT OF DIVIDENDS

Debts not Provable

Creditors are of two classes, secured and unsecured. A secured creditor is one who holds a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor. (See also Chapter XII of this Part.)

Certain debts are not provable in bankruptcy or under a composition. These are:—

1. Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust.

2. A debt or liability contracted by the debtor with any person subsequently to the date of his having notice of an available act of bankruptcy against the debtor.

3. A debt or liability the value of which, in the opinion of the Court, is incapable of being fairly estimated

Debts Provable

All other debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, are debts provable in bankruptcy. Any debt or liability subject to any contingency, or for any other reason of uncertain value, is valued by the trustee, and if a person is aggrieved by the estimate made by the trustee, he may appeal to the Court. The Court may direct the assessment of the value of any such debt or liability which is capable of being fairly estimated. "Liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any sort of contract, agreement, or undertaking, whether the breach takes place before the discharge of the debtor or not, and, in general, any express or implied agreement to pay, whether the payment is fixed or unliquidated, due at the present or any future time.

Rules for Proof

The rules for the proof of debts are set out in the second Schedule of the Act of 1883. Briefly, every creditor must prove his debt as soon as possible after the receiving order, either by delivering or sending through the post to the official receiver or trustee an affidavit verifying the debt made by the creditor or some authorized person, and particulars of the debt should be furnished, and vouchers, if any, referred to. It should be stated whether the creditor is secured or not. The form of proof which is sent to the creditor is as given on p. 120.

A creditor who has lodged a proof is entitled to see and examine the proofs of other creditors. From the debt should be deducted trade discounts, but not a discount, not exceeding 5 per cent, which may have been agreed to have been allowed for cash payment. If a secured creditor realizes his security he may prove for the deficiency If he surrenders his security, he may prove for the whole of his debt. If he does not either realize or surrender his security, he must, before ranking for dividend, state the particulars of his security and the value he puts on it. He is then entitled to receive a dividend only upon the balance of his debt. The trustee may redeem the security at the value assessed by the creditor. If the trustee is dissatisfied with the assessed value, he may require the property to be realized; but the creditor may, at any time, require the trustee to elect whether he will or will not exercise his power of redeeming or requiring realization. If the trustee does not thus within six months signify his intention of exercising the power, he is no longer entitled to exercise it.

A creditor may, if a valuation was made *bona fide* on a mistaken estimate or owing to a diminution of the value of the security, obtain leave to amend this valuation. The dividend will be adjusted accordingly in the event of a surplus or deficiency in the amended value of the security. If a creditor realizes his security after having valued it, the net amount realized will be substituted for the amount of the valuation and be treated as an amended valuation. The secured creditor who does not comply with these rules is excluded from all share in any dividend, and in no case, of course, is he entitled to receive more than 20s. in the £1 and interest.

Proof in respect of distinct contracts where the debtor was at the date of the receiving order liable on distinct contracts, as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, may be made against the properties respectively liable on the contracts. Proportionate parts of periodical payments such as rent may be proved for up to the date of the receiving order. A creditor may prove for interest at a rate not exceeding 4 per cent on sums overdue at the date of the receiving order. Similarly, if a debt is not payable until a future

Form 14

Proof of Debt. General Form

(*Title*)

(Where debt exceeds £2, 1*s.* stamp required to be affixed and not cancelled, or P.O. for 1*s.* enclosed.)

No. (*a*) ..... of 19.....

Re (*a*) .....

I (*b*) ..... of ..... in the county of ....., make oath and say:—

(*c*) That I am in the employ of the under-mentioned creditor, and that I am duly authorized by ..... to make this affidavit, and that it is within my own knowledge that the debt hereinafter deponed to was incurred, and for the consideration stated, and that such debt, to the best of my knowledge and belief, still remains unpaid and unsatisfied.

(*d*) That I am duly authorized, under the seal of the company hereinafter named, to make the proof of debt on its behalf.

That the said ..... w....., at the date of the receiving order, viz. the ..... day of ....., 19....., and still ..... justly and truly indebted to (*e*) ..... in the sum of ..... pounds ..... shillings and .. .. .pence for (*f*) .... as shown by the account endorsed hereon, *or* by the following account, viz.:—

.....

for which sum or any part thereof I say that I have not nor hath (*g*) .... or any person by (*h*) ..... order to my knowledge or belief for (*h*) ..... use had or received any manner of satisfaction or security whatsoever save and except the following (*i*):—

Date.	Drawer.	Acceptor.	Amount.	Due Date

Admitted to vote for : : the ..... day of ....., 19.....

Official Receiver or Trustee,

Admitted to rank for dividend for £ : : this ..... day of ...., 19.....

Official Receiver or Trustee,

Sworn at ..... in the county of ..... this ..... day of ...., 19. .. . Before me ....

(*g*) Deponent's signature.

(*g*) ....

The proof cannot be admitted for voting at the first meeting unless it is properly completed and lodged with the Official Receiver before the time named in the notice convening such meeting.

A (at back)

PARTICULARS OF ACCOUNT referred to on other side

(Credit should be given for contra accounts.)

If space not sufficient, let the particulars be annexed, but where the particulars are on a separate sheet of paper, the same must be marked by the person before whom the affidavit is sworn.

Date.	Consideration.	Amount.	Remarks

(*a*) Here insert the number of matter, and the name of debtor, as given on the notice of meeting.

You should attend carefully to these directions.

(*b*) Fill in full name, address, and occupation of deponent.

If proof made by creditor strike out clauses (*c*) and (*d*)

If made by clerk strike out (*d*)

If by agent of company strike out (*c*). (*e*) Insert me and to C D and E F, my copartners in trade, if any, or, if by clerk, insert name, address, and description of principal

NOTE THIS

(*f*) *State consideration* [*as* -- Goods sold and delivered by me [and my said partner] to him [or them] at his [or their] request between the dates of, [*or*, monies advanced by me in respect of the under mentioned bill of exchange,] *or as the case may be*].

(*See back*)

(*g*) My said partners or any of them or the above-named creditor (*as the case may be*).

(*h*) My or our or their or his (*as the case may be*)

(*i*) [Here state the particulars of all securities held, and where the securities are on the property of the debtor, assess the value of the same, and if any bills or other negotiable securities be held, specify them in the schedule.]

The vouchers (if any) by which the account can be substantiated should be set out here.

time, a creditor may prove subject to rebate at the rate of 5 per cent per annum.

The trustee examines every proof and the grounds of the debt, and in writing admits or rejects it, in whole or in part, or may require further evidence (Form 15). He must state in writing the grounds of the rejection. The Court may expunge a proof or reduce its amount which the trustee thinks has been improperly admitted, and a creditor may appeal to the Court to reverse or vary the decision of the trustee in respect of a proof. The Court may also expunge or reduce a proof on the application of a creditor if the trustee declines to interfere, or, in the case of a composition or scheme, upon the application of the debtor. A creditor may withdraw a proof

Form 15

Notice of Rejection of Proof of Debt

(*Title*)

Take notice, that, as Official Receiver of the above Estate, I have this day rejected your claim against such estate (*a*) *to the extent of £* on the following grounds:—

. . . . . .

And further take notice that, if you are dissatisfied with my decision in respect of your proof, you may apply to the Court to reverse or vary the same, but, subject to the power of the Court to extend the time, no application to reverse or vary my decision in rejecting your proof will be entertained after the expiration of ..... days from this date.

Dated this .... day of ..... . , 19 ...

. ..., ... *Official Receiver.*

Signature ... .
Address . ...

To . ...

(*a*) If proof wholly rejected strike out words in italics.

before the trustee has notified that he has admitted or rejected it.

Priority of Debts

Debts are now payable in the order laid down by the Preferential Payments in Bankruptcy Act, 1888, the same rule being observed in the distribution of the assets of a company which is being wound up. (See Chapter IV of this Part.)

Before the unsecured creditors are paid anything, the costs of administration in bankruptcy must be provided for in the prescribed order, subject to any special order of the Court.

There are three classes of debts which are paid first, and which rank equally between themselves for payment in full, or, in case of insufficiency of assets to meet them, in equal proportions between themselves, subject only to the cost of administration taking precedence of them. As far as the property admits, these debts are discharged forthwith. They are as follows:—

(*a*) All parochial or other local rates due from the bankrupt at the time of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt up to the 5th of April next before the date of the receiving order, and not exceeding in the whole one year's assessment;

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding £50; and

(*c*) All wages of any labourer or workman not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the bankrupt during two months before the date of the receiving order. If any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year, he has priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due upon the contract, proportionate to the time of service up to the date of the receiving order.

Another class of preferential payment may arise where, at the time of the presentation of the bankruptcy petition, any person is an apprentice or an articled clerk to the bankrupt. In such case, if either the bankrupt or the apprentice or clerk gives written notice to the trustee to that effect, the bankruptcy is a complete discharge of the indenture of apprenticeship or articles of agreement. With regard to any premium paid to the bankrupt, the trustee may, on the application of or on behalf of the apprentice or clerk, pay any sum he thinks reasonable, subject to appeal to the Court, out of the bankrupt's property, to or for the use of the apprentice or clerk, having

regard to the amount originally paid, and the time served, and other circumstances of the case. If the trustee thinks it expedient, however, on the application of the apprentice or clerk, he may, instead of repayment, transfer the indenture or articles to some other person.

Priorities are also given in favour of Friendly Societies, Workmen's Compensation, and Savings Banks. (See Chapters V and X of this Part.)

A landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him, but distress levied after the commencement of the bankruptcy is available only for six months' rent accrued due prior to the date of the order of adjudication (or order for administration in the case of small estates or of a deceased person dying insolvent). For any surplus due the landlord may prove under the bankruptcy.

If a landlord or other person distrains or has distrained upon any goods or effects of a bankrupt within three months next before the date of the receiving order, the three preferential debts are a first charge on the goods or effects so distrained on or the proceeds of sale. The landlord or other person paying money under such a charge will have the same rights of priority as the person to whom such payment is made.

These rules as to priority apply in the case of a deceased person dying insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order.

Partnership

The general rules of partnership are dealt with elsewhere (see Chapter III of this Part). Unless otherwise provided by agreement, every partnership is dissolved as regards all the partners by the bankruptcy of one partner. A petition may be presented against any one or more partners of the firm by any creditor whose debt is sufficient to entitle him to petition against all the partners, and a petition may be dismissed as to one or more of the respondents only.

Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other petition against or by a member of the same partnership must be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the same trustee or receiver must be appointed, and the Court may direct the consolidation of the proceedings.

Where a member of a partnership is adjudged bankrupt, the Court may authorize the trustee to bring any action in the names of the trustee and of the bankrupt's partner, and any release by such partner of the debt or demand to which the action relates is void. Notice of the application for such authority must be given to the partner so that he may show cause against it, and the Court may direct that he shall receive his proper share of the proceeds. He must be indemnified against costs, if he does not claim any benefit from the action.

Where a bankrupt is a joint contractor, the other person or persons may sue and be sued in respect of the contract without a joinder of the bankrupt.

The joint estate of the partnership is applicable in the first instance to the payment of the joint debts, and the separate estate in the first instance to the payment of the separate debts. If there is a surplus of the separate estate, it is dealt with as part of the joint estate. If there is a surplus of the joint estate, it is dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate. There are, however, certain exceptions to this rule which have been established by well-known cases. If there is no joint estate and no solvent partner, a joint creditor may receive dividends out of the separate estate along with the separate creditors. A joint creditor who is a petitioning creditor in a separate adjudication may receive dividends out of the separate estate. If an individual partner has fraudulently withdrawn funds from the partnership and applied them to his own use, creditors are entitled to prove against his separate estate with the separate creditors, and *vice versa*. A firm is allowed to prove against the estate of a member carrying on a distinct and separate trade, provided the debts have arisen in the ordinary course of business, or a member may prove against the firm in like circumstances.

Deferred Debts

In the case of an advance made by a person to another engaged or about to engage in any trade or undertaking for payment of interest varying with profits, or a share of profits, or on an agreement for payment of goodwill by annuity varying with profits, though not amounting to a partnership, payment is deferred in the event of the borrower's bankruptcy or insolvency until the claims of all the other creditors are satisfied. Secondly, a wife's money or other estate lent or entrusted to her husband for the purpose of any trade or business will be treated as assets of his estate in the event of his bankruptcy, but the

A WHEATFIELD IN THE CANADIAN WEST

THRESHING ON A WHEATFIELD IN THE CANADIAN WEST

wife has a right to claim a dividend when the claims of all the other creditors for valuable consideration have been satisfied. This only applies to a loan in his business; for loan to the firm of which he is a member, or a private loan to him, she may prove in bankruptcy with the other creditors. A money lender may have a claim for excessive interest cut down by the Court. (See Chapter XII of this Part.)

Where a debt which has been proved includes interest or consideration in lieu of interest, the interest for the purposes of dividend is calculated at 5 per cent, although the balance of any higher rate of interest may be received by the creditor after all the debts proved in the estate have been paid in full.

All other debts are payable in the bankruptcy *pari passu*. If there is any surplus after the payment of the debts, it is to be applied in payment of interest at 4 per cent per annum on all debts proved in the bankruptcy from the date of the receiving order.

Mutual Dealings

Where there have been mutual credits, debts, or other dealings by way of running account between the debtor and any other person proving or claiming to prove a debt, an account is taken of what is due from the one party to the other, with a set-off of the sum due to as against the sum due from the creditor, and the balance of the account and no more is claimed or paid on either side respectively; but a person is not entitled to claim the benefit of any set-off against the property of the debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him. (As to "Accommodation Bills", see Chapter VII of this Part.)

Payment of Dividends

Subject to the retention of such sums as may be necessary for the cost of administration or otherwise, it is the duty of the trustee with all convenient speed to declare and distribute dividends amongst the creditors who have proved their debts. The first dividend, if any, must be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing it. Subsequent dividends are generally declared at intervals of six months or less. Before declaring a dividend, the trustee gives notice to the Board of Trade in order that it may be gazetted, and also notifies each creditor mentioned in the bankrupt's statement, who has not proved his debt. Opportunity is given for appeal by those whose proof is rejected. When the trustee has declared a dividend he must send to each creditor who has proved a notice showing the amount of the dividend and when and how it is payable, and particulars of the estate in the prescribed manner.

Where one partner of a firm is a bankrupt a creditor to whom he is indebted jointly with the other partners is not to receive any dividend out of the separate property until all the separate creditors have received the full amount of their debts. Where joint and separate properties are being administered, dividends of these properties, subject to any order made by the Court, are declared together, and the expenses are fairly apportioned by the trustee between the joint and separate properties. In calculating and distributing a dividend, provision must be made by the trustee for debts provable in bankruptcy appearing from the bankrupt's statement or otherwise to be due to persons resident in distant places. Provision must also be made for disputed proofs or claims as well as for administration expenses; but, subject to this, the trustee must distribute as dividends all the money in hand.

If a creditor has not proved his debt before the declaration of any dividend, he is entitled to be paid out of any money for the time being in the hands of the trustee any dividend he might have received before the money is applied to the payment of future dividends; but he is not entitled to disturb the distribution of any dividend declared before his debt was proved by reason of his non-participation.

When the trustee has realized all the property of the bankrupt, or all that can be realized in the joint opinion of himself and the committee of inspection without needlessly protracting the trusteeship, he must declare a final dividend. Before doing so, however, he must give notice to persons who have claimed, but have not established their claims to his satisfaction, that, if they do not establish their claims within a time limited by the notice, he will proceed to make a final dividend, disregarding their claims. Subject to that, or to the Court granting any further time, the property of the bankrupt is divided amongst the creditors who have proved their debts.

A creditor cannot sue the trustee for a dividend, but the trustee may be ordered by the Court to pay, and, if he is in default, to pay interest out of his own pocket. If any surplus remains after the payment of debts in full, with interest, and all the costs, charges, and expenses of the proceedings, the bankrupt is entitled to it.

Dividends in the hands of the trustee unclaimed for more than six months, or unclaimed and undistributed moneys left in the hands of the trustee after a final dividend, are to be paid into the Bankruptcy Estates Account under the control of the Board of Trade.

Any person claiming to be entitled to any moneys paid into this account may apply to the Board of Trade. The Board, if satisfied as to the claim, may make an order for payment; or from a refusal the applicant may appeal to the High Court.

DUTIES OF OFFICIAL RECEIVERS AND TRUSTEES

Official Receivers

Official Receivers are officers of the court, appointed by and acting under the directions of the Board of Trade. One is generally appointed for each bankruptcy district and three for the London district. As we have seen, they act as trustees of the bankrupt's estate, and the property vests in them immediately the receiving order is made; they have all the powers of a trustee until one is appointed. They have duties not only with regard to the estate, but as to the debtor; the nature of these duties is seen from what is said elsewhere. They account to the Board of Trade, by whom they are remunerated. The Bankruptcy Estates Accounts of the Board of Trade are duly audited and an annual report is laid before Parliament.

Trustees

The trustee is appointed by the creditors, and supersedes the interim trustee, that is, the Official Receiver. He is, for an estate of any size, usually a chartered accountant. He must give security, by bond, to the satisfaction of the Board of Trade. (As to appointment, see page 112.) His remuneration, if any, is fixed by an ordinary resolution of the creditors, or, if they so resolve, by the committee of inspection. It is in the nature of a commission or percentage, one part payable on the amount realized, and the other part on the amount distributed. The remuneration can be cut down by the Board of Trade. The remuneration may be made to cover expenses, and, if no remuneration is voted, the trustee is entitled to proper costs and expenses out of the estate. He must on no account make any arrangement or accept any payment from the bankrupt or any person employed on his behalf. He must not be interested in the purchase of any of the property, nor sell to his partner. The trustee is not entitled, when he receives remuneration, to engage anybody else to perform the duties.

The trustee must pay in all money received to the Bankruptcy Estates Account of the Board of Trade at the Bank of England, unless, for the purposes of carrying on the debtor's business, the Board of Trade is satisfied that it is necessary for the trustee to have an account at a local bank. He must on no account pay any sums received into his private banking account.

The accounts of every trustee must be made up, not less frequently than half yearly, and sent to the Board of Trade to be duly audited. One copy is then kept by the Board and another filed with the Court. The trustee must furnish to any creditor lists of the creditors with the amounts of the debts. He must keep proper books, and minutes of proceedings at meetings, and to all these, subject to the control of the Court, creditors have access. An annual or more frequent statement is to be transmitted by the trustee to the Board of Trade, showing the particulars of the bankruptcy, and the trustee can be called to account by the Board of Trade for any misfeasance, neglect, or omission. There may be joint trustees, and a person may be appointed by the creditors to act in succession to one unable to act. The office is vacated by the trustee's insolvency. Creditors may remove a trustee appointed by them and appoint another. The Board of Trade may remove a trustee for misconduct, inability, or unsuitability, subject to an appeal of the creditors to the Court. The creditors may appoint to a vacancy in the office of trustee at a meeting summoned by the official receiver; failing the appointment, the official receiver acts as trustee. The trustee must act in accordance with directions given by resolutions of the creditors at any general meeting, or by the committee of inspection. He may summon general meetings from time to time, and may apply to the Court for directions. Either the bankrupt or any of the creditors or any other person aggrieved may appeal to the Court against any act or decision of the trustee.

Property Vesting in Trustee

We have already seen the nature of the property which becomes divisible amongst the creditors (p. 115), and for this purpose vests in the trustee for realization. The trustee has a discretion, however, in regard to certain classes of property, and

he may disclaim onerous property and any unprofitable contracts, leaving other parties to their remedy in damages against the estate. It is expressly provided that where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership, may disclaim the property. This he must do in writing, signed by him within twelve months after his first appointment as trustee; but if any such property has not come to his knowledge within one month after his appointment, he may disclaim any time within twelve months after he first became aware of it. This disclaimer determines, from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt, and also discharges the trustee; but, except in so far as is necessary to release the bankrupt and his property and the trustee from liability, does not affect the rights or liabilities of any other person. The trustee may not disclaim a lease without the leave of the Court, except in certain cases. The Court may, before giving leave, require notices to be given to interested persons and impose conditions. The trustee is not entitled to disclaim any property in any case where a written application has been made to him by any person interested requiring him to decide whether he will disclaim or not, and the trustee has for twenty-eight days after the receipt of the application, or such extended period as the Court may allow, declined or neglected to give notice whether he disclaims or not. In the case of a contract, after such application has been made, if the trustee does not within the period disclaim the contract, he is deemed to have adopted it.

The Court has a discretionary power, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, to make an order rescinding the contract on terms as to payment of damages, &c. The Court may also, on the application of any person either claiming an interest in any disclaimed property or under any liability, make an order for vesting or delivering the property to any person entitled. Where the property disclaimed is of leasehold nature, the Court must not make a vesting order in favour of any person claiming under the bankrupt, except upon the terms of making such a person subject to the same liabilities and obligations which the bankrupt was subject to under the lease at the date of the filing of the bankruptcy petition. Any mortgagee or under-lessee declining to accept a vesting order on such terms is excluded from all interest in and security upon the property. If there is no person claiming under the bankrupt willing to accept an order upon such terms, the Court has power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estate, encumbrances and interests created therein by the bankrupt.

Any person injured by a disclaimer of this character is deemed to be a creditor of the bankrupt to the extent of the injury, and may prove for his debt in the bankruptcy.

Trustee's Power of Disposition

The ordinary powers of the trustee in regard to the property are:

(1) To sell all or any part of the property, including the goodwill of a business and the book debts, by public auction or private contract, and transfer the whole to the buyer; give receipts and effect discharges; prove, rank, claim, and draw dividends in respect to any debts due to the bankrupt; exercise the necessary powers vested in the trustee and execute deeds or any other documents required; deal with any property to which the bankrupt was beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it.

(2) *With the permission of the committee of inspection or the Board of Trade*, the trustee may carry on the business of the bankrupt so far as may be necessary for the beneficial winding up; bring and defend any action relating to the bankrupt's property; employ a solicitor or other agent to take any proceedings duly sanctioned; accept as consideration for the sale of any property future payments, subject to stipulations and security agreed by the committee; mortgage or pledge any part of the property to raise money; refer disputes to arbitration, compromise debts, claims, and liabilities on terms; compromise claims of creditors, or claims arising out of the property; divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or for special circumstances, cannot be readily or advantageously sold.

The permission of the committee of inspection or of the Board of Trade must be given specifically, and not generally, to do any of these acts.

Control over Trustee

In the event of any trustee not faithfully performing his duties, or on any complaint being made, the Board of Trade enquires into the matter and takes such action as is deemed expedient. The Board may, at any time, require the trustee to answer any enquiry, and apply to the Court to examine on oath the trustee or any other person concerning the bankruptcy, or direct a local investigation of the books and vouchers of the trustee. When a trustee is allowed to carry on the business he must submit monthly accounts to the committee.

Release of the Trustee

When the trustee has realized all the property and distributed a final dividend, or in other ways has ceased to act, the Board of Trade on his application causes a report on his accounts to be prepared, and, after consideration of the report and any objections urged by creditors or persons interested, may grant or withhold the release, subject to an appeal to the Court. The trustee must give notice of his application to the creditors who have proved and to the debtor, sending them a summary of his accounts. Where the release is withheld, the Court may make an order charging the trustee with the consequences of his default. An order of the Board of Trade releasing the trustee discharges him from all liability in respect of any act done or default made by him in the administration of the affairs in the bankruptcy, or otherwise in relation to his conduct as trustee, but such an order may be revoked if obtained by fraud, or suppression or concealment of any material fact.

DISCHARGE OF THE BANKRUPT

A person who is adjudged bankrupt is naturally anxious to secure his discharge as soon as possible. For this he must apply to the Court, but no application will be heard until the public examination is concluded; otherwise the bankrupt may apply to the Court at any time after his adjudication. The form of application is as follows:—

Form 16

Application for Order of Discharge

(*Title*)

I, *A. B.*, of ....., having been adjudged bankrupt on the ..... day of ....., 19..., and being desirous of obtaining my discharge, hereby apply to the Court to fix a day for hearing my application.

My public examination was concluded on the ..... day of .....

Annexed hereto is the certificate of the official receiver certifying the number of my creditors.

Dated this ..... day of ....., 19...

(*Signed*) A. B.

To the Registrar of the ..... Court.

The Application

The application is heard in open court, and there must be a report of the official receiver as to the bankrupt's affairs, including a report as to his conduct during the proceedings under his bankruptcy filed not less than seven days before the hearing. The Court may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. The bankrupt must produce to the registrar a certificate from the official receiver specifying the creditors who require to be notified of the intention to apply for a discharge. The Registrar gives not less than twenty-eight days' notice of the hearing, which is gazetted by the official receiver, who must also send fourteen days' notice to every creditor in the bankrupt's statement of affairs

Cases in which Court must refuse Discharge

The Court must refuse the discharge in all cases where the bankrupt has committed any offences under the Debtors Act, 1869, or the Bankruptcy Act, or any felony or misdemeanour connected with his bankruptcy (see p. 129), unless for special reasons the Court otherwise determines.

Refusing or Suspending the Discharge

In other cases it is the duty of the Court either to refuse the discharge; or suspend the discharge for a period of not less than two years, or until a dividend of not less than 10s. in the £1 has been paid to the creditors; or require the bankrupt, as a condition of his discharge, to consent to judgment being entered against him by the official receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the

discharge. Such balance or part of any balance is to be paid out of the future earnings or after-acquired property of the bankrupt as directed by the Court, but execution in the judgment can only be issued by leave. Any time after the expiration of two years from the date of this order, if the bankrupt satisfies the Court that there is no reasonable probability of his being in a position to comply with these terms, the Court may vary the order.

The following are the facts upon proof of which the Court is required to make an order as above:—

(*a*) That the bankrupt's assets are not equal to 10*s*. in the £1 on the amount of his unsecured liabilities, unless the deficiency in value is accounted for from circumstances for which the bankrupt cannot justly be held responsible.

(*b*) That the bankrupt has omitted to keep usual and proper books of account in his business so as sufficiently to disclose his business transactions and position within the three years preceding his bankruptcy.

(*c*) That the bankrupt has continued to trade after knowing himself to be insolvent.

(*d*) That the bankrupt has contracted any debt provable in the bankruptcy without at the time having any reasonable or probable expectation (the proof of which is upon him) of being able to pay it.

(*e*) That the bankrupt has failed to account satisfactorily for any loss of assets or deficiency of assets to meet his liabilities.

(*f*) That the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs.

(*g*) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action brought against him.

(*h*) That the bankrupt has within three months of the date preceding the receiving order incurred unjustifiable expense by bringing a frivolous or vexatious action; or,

(*i*) Within the same time, when unable to pay his debts as they became due, has given an undue preference to any of his creditors; or,

(*j*) Within the same time, has incurred liabilities with a view to making his assets equal to 10*s*. in the £1 on the amount of his unsecured liabilities.

(*k*) That the bankrupt has on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors.

(*l*) That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

A bankrupt's assets are deemed to be of the value of 10*s*. in the £1 on the amount of his unsecured liabilities when the Court is satisfied that the property of the bankrupt has realized, or is likely to realize, or with due care might have realized, an amount equal to 10*s*. in the £1 on his unsecured liabilities, and a report by the official receiver or the trustee is *prima facie* evidence of the amount of such liabilities, as it is of other statements contained in it. If the bankrupt intends to dispute any statement in the report, he must give notice to the trustee. Any creditor who intends to oppose the discharge on grounds other than those mentioned in the report, must give two days' notice to the official receiver.

Even after a bankrupt is discharged, he must give assistance to the trustee in realizing and distributing property vested in the trustee at the risk of being held guilty of contempt of Court and having his discharge revoked.

In two other cases the Court may refuse or suspend an order of discharge, or grant an order subject to conditions (or refuse to approve a composition arrangement):

1. In the case of a settlement made before or in consideration of marriage, where the settlor was not at the time of making the settlement able to pay all of his debts without the aid of the property comprised in the settlement; or

2. In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, not being money or property of or in right of his wife.

In either of these cases, if the settlor is adjudged bankrupt, or compounds or arranges with his creditors, and it appears to the Court that such settlement or contract was made in order to defeat or delay creditors, or was unjustifiable in the state of the settlor's affairs, the Court may refuse or suspend the discharge or make a conditional order.

A conditional order of discharge will not, however, be held for an indefinite time over a man's head if he has done his best. The debtor should apply for his release.

Effect of Order of Discharge

An order of discharge releases the bankrupt from all debts provable in bankruptcy, except any debt on a recognizance, or one with which the bankrupt may be chargeable at the suit of the Crown or of any person for an offence against a revenue statute, or such similar offences, unless the Treasury has certified in writing their consent to his discharge; or any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, or any debt or liability whereon he

has obtained forbearance by any fraud to which he was a party, or from certain debts referred to on p. 111.

An order of discharge does not release any person who, at the date of the receiving order, was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him, or any person who was a surety or in the nature of a surety for him. (See Chapter VIII of this Part.)

SMALL BANKRUPTCIES

Summary Proceeding

In small bankruptcies, that is, where the Court is satisfied that the property of the debtor is not likely to exceed in value £300, the estate may be administered in a summary manner under provisions which aim at expedition and a saving of costs. If there is no proposal for a composition or scheme, bankruptcy ensues at once, and the official receiver is the trustee. There is no committee of inspection, but with the permission of the Board of Trade the official receiver may perform all acts usually done by a trustee, with the permission of the committee of inspection. The public examination and discharge are governed by the general rules; but in other ways the administration of the estate is simplified and is worked on a lower scale of costs.

The creditors may, however, at any time by special resolution resolve that some person other than the official receiver shall be trustee, and thereupon the bankruptcy proceeds as if an order for summary administration had not been made.

Administration Orders

Where a judgment has been obtained in a County Court, and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness does not exceed £50, inclusive of the judgment debt, the County Court may make an order providing for the administration of his estate and for the payment of his debts by instalments or otherwise or in full, and having regard to future earnings and income. The administration may be in that County Court or in another where the debtor or the majority of the creditors reside. The costs of administration are not to exceed 2*s.* in the £1 on the total amount of the debts.

Where it appears to the Registrar of the County Court that the property of the debtor exceeds £10 in value, at the request of any creditor he will, without fee, issue execution against the debtor's goods, excluding certain household goods, wearing apparel, and bedding of the debtor and family, and tools and implements of his trade, to the aggregate of £20.

When an administration order is made, no creditor has any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court except with the leave of that Court on terms imposed; and any County Court in which proceedings are pending against the debtor will stay such proceedings on receiving notice of the order, but may allow costs already incurred. Provision is also made for the default of the debtor in paying any instalment, objection by creditors to scheduled debts, rescission or suspension of the order, payment of dividend, and discharge of the debtor.

Committal Orders

County Court judges within the jurisdiction of which a judgment debtor is or resides have, under the Debtor's Act, 1869, power to commit to prison for a term not exceeding six weeks until payment of the sum due, any person who makes default in payment of any sum or instalment of any debt due under any order or judgment. Such committal will only take place when the Court is satisfied that the defaulter has the means and refuses or neglects to pay the debt.

Where an application is made to a Court having bankruptcy jurisdiction, the Court, if it thinks fit, may decline to commit, and with the consent of the judgment creditor make a receiving order against the debtor. In such case a judgment debtor is deemed to have committed an act of bankruptcy at the time the order is made, unless he is proved to have committed any previous act of bankruptcy.

Where an application is made to a County Court, and the total liabilities of the judgment debtor do not exceed £50, the Court may make an administration order instead of a receiving order.

BANKRUPTCY ADMINISTRATION OF INSOLVENT ESTATES

The estate of a person dying insolvent may be administered in bankruptcy in a manner similar to that in which it would have been treated had the deceased person become bankrupt while living. Any creditor whose debt would have been sufficient to support a bankruptcy petition may present to the Court a petition for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy (Form 17). Notice must be given to the legal personal representative of the debtor, and then upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts, either make or refuse an order for administration. Such notice has the effect of a notice of an act of bankruptcy.

Form 17

Creditor's Petition for Administration of Estate of Deceased Debtor in Bankruptcy

(*Title*)

I, *C. D.*, of .... (or we, *C. D.*, of ....., and *E. F.*, of .. ..), hereby petition the Court that an order be made for the administration in bankruptcy of the estate of the late (*here insert name and description of deceased debtor*), who died on the . . day of ..... , 19 , and say:—

1. That the said *A. B.* for the greater part of the six months next preceding his decease resided (*or* carried on business) at . .. ... within the district of this Court (*or, as the case may be*, ...) (see p. 102).

2. That the estate of the said *A. B.* is justly and truly indebted to me (*or* us in the aggregate) in the sum of £ (*set out amount of debt or debts and the consideration*).

3. That (I) do not, nor does any person on (my) behalf, hold any security on the said deceased debtor's estate, or on any part thereof, &c. (*or, as in Form 5, Creditor's Petition*) (p. 104).

4. That *A. B.*, within three months next before the said date of his decease, committed the following act (*or* acts) of bankruptcy, namely (*here set out the nature and date or dates of the act or acts of bankruptcy relied on*).

Or,

That the will of the said *A. B.* (*or, as the case may be,*) was on the ..... day of ...., 19..., proved by *J. S.*, of ....., and *G. H.*, of ....., who consent to this petition.

Or,

That letters of administration (*or, as the case may be,*) were on the ..... day of ....., 19..., granted to *J. S.*, of ....., and *G. H.*, of ....., and that the estate of the said *A. B.* is (according to my information and belief) insufficient to pay his debts.

Dated this ..... day of ...., 19..

(*Signed*) C. D.
E. F.

[Signed by the petitioner in my presence.]
Signature of Witness ..... .
Address ....
Description . . . .

This petition must be supported by affidavit, and is endorsed as in the case of a creditor's petition, and also with notice to the personal representation as follows:—

If you, the said *J. S.* or *G. H.*, intend to dispute the matter of any of the statements contained in the petition, you must file with the Registrar of this Court a notice showing the grounds upon which you intend to dispute the same.

A petition must not be presented to the Court if proceedings have been commenced in any Court for the administration of the deceased debtor's estate, but that Court may, for sufficient reason, transfer the proceedings to the Court in bankruptcy.

On the making of the order, the property of the debtor vests in the official receiver as trustee, and he proceeds forthwith to realize and distribute the proceeds. The ordinary provisions with regard to the administration, proof of debts, property available, antecedent transactions, realization and distribution, then apply, but the claim of the personal representative of the deceased debtor for payment of the funeral and testamentary expenses is a preferential debt, and payable in priority to all others. If, after payment of all the debts, any surplus remains, it will be paid over to the personal representative, or as otherwise ordered. The ordinary rules apply with regard to the appointment and conduct of trustees and committees.

FRAUDULENT DEBTORS

Fraudulent debtors are punishable under the provisions of the Debtors Act, 1869, and the Bankruptcy Acts. A series of offences are misdemeanours, and a bankrupt committing any of them is liable on conviction to imprisonment for two years, with or without hard labour. The principal offences are as follows:—

1. With intent to defraud, failing to make full discovery of his property to the trustee.

2. With intent to defraud, failing to deliver up

to the trustee property, or books, documents, &c., in his custody, which he is required to deliver up.

3. Concealing or removing property to the value of £10 or upwards, or concealing any debt, after or within four months before the presentation of the petition; or

4. Fraudulently making any material omission in his statement of affairs; or

5. Failing to inform the trustee of a false debt known to him.

6. Fraudulently preventing the production of books.

7. Fraudulently concealing, destroying, or falsifying the books or documents, or making false entries.

8. Fraudulently parting with or altering the books.

9. Attempting to set up or setting up fictitious losses or expenses, or falsely representing that he had obtained any property on credit which he has not.

10. As a trader obtaining any property on credit; or

11. Pawning, pledging, or disposing of any property so obtained by false representations within four months before the bankruptcy petition.

12. Making any false representation or other fraud to obtain the consent of the creditors to any agreement in regard to his affairs.

13. Obtaining credit while an undischarged bankrupt, without disclosing the fact, to the extent of £20.

14. It is felony fraudulently to abscond or attempt to abscond from England, taking property to the extent of £20.

It is a misdemeanour, subjecting to imprisonment for one year, for any person to obtain credit under false pretences, or, with intent to defraud creditors, to make any gift or charge on his property, or with the same intent to conceal or remove any part of his property since or within two months before the date of any unsatisfied judgment or order for payment obtained against him. It is a similar misdemeanour for a creditor in any bankruptcy proceedings to make a false claim. The Court may order the prosecution of a fraudulent debtor at the instance of the trustee. The Court may also commit for trial a bankrupt or any other person guilty of a misdemeanour in bankruptcy.

DISQUALIFICATIONS OF BANKRUPTS

A person who becomes bankrupt is disqualified from sitting or voting in the House of Lords, or being elected to, or sitting or voting in the House of Commons, or any Committee of either House; being appointed or acting as a justice of the peace, or being elected to or holding or exercising the office of mayor, alderman, or councillor, poor law guardian, overseer of the poor, member of a sanitary authority, county council, highway board, burial board, &c.

The disqualification ceases if and when: (*a*) the adjudication is annulled, or (*b*) the bankrupt obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct. The granting of the certificate is in the discretion of the Court, but is subject to appeal.

The disqualification extends to all parts of the United Kingdom and lasts for five years.

On the bankruptcy of a member of the House of Commons, if the disqualification is not removed within six months from the date of the order, the Court certifies the fact to the Speaker of the House of Commons, and the seat of the member is thereupon declared vacant.

On the adjudication in bankruptcy of a person holding the office of mayor, alderman, councillor, guardian, &c., the office thereupon becomes vacant.

ARRANGEMENTS OUTSIDE THE BANKRUPTCY ACTS

A man may be in difficulties verging on bankruptcy, but may yet be able to make arrangements with his creditors which do not come within the purview of the Bankruptcy Acts. Insolvency is more frequently dealt with under what are termed deeds of arrangement than by liquidation in bankruptcy. Even without a deed of arrangement, it is often possible for a man's position to be met by arrangement with his creditors for forbearance or acceptance of a composition. It depends very much upon the gravity of the situation and the character of the debtor's previous dealings as to whether this arrangement requires a formal treatment or not. The intervention of friends who may be prepared either to guarantee or make advances may often create a situation which is more favourable both to the debtor and his creditors than extreme measures. An arrangement may or may not be coupled with an assignment of the property or a composition.

Wherever there is an agreement in writing it is required by law to be registered at the office of the Registrar of Bills of Sale, in England and Ireland.

The adjustment of embarrassed business affairs is increasingly effected by such means rather than bankruptcy, being less costly, more expeditious, and without the same publicity.

Deeds of Arrangement

A deed of arrangement is not necessarily a deed in the ordinary sense, that is, a document under seal. It is provided that a deed of arrangement shall include instruments in respect of the affairs of a debtor for the benefit of his creditors, other than in bankruptcy proceedings, of the following character:

(*a*) An assignment of property.

(*b*) A deed or agreement for a composition; and, in cases where the creditors of a debtor obtain any control over his property or business,

(*c*) A deed of inspectorship entered into for the purposes of carrying on or winding up a business;

(*d*) A letter of licence authorizing the debtor or any other person to manage, carry on, realize, or dispose of a business with a view to the payment of debts;

(*e*) Any agreement or instrument entered into for the purpose of carrying on or winding up a debtor's business or authorizing the debtor or any other person to manage, carry on, realize, or dispose of the debtor's business with a view to the payment of his debts.

Neither deeds of inspectorship nor letters of licence are common. Under the former the debtor is allowed to carry on a business subject to supervision. By letters of licence creditors agree for a certain time that a debtor shall carry on or make arrangements for the benefit of all his creditors equally.

Wherever an agreement has been made of this character, except by a limited company, it must be stamped and registered within seven days after execution, otherwise it is void. Such arrangements becoming public in this way are notified in the trade papers and in the ordinary channels of communication.

It is to be noted that an agreement for the benefit of certain creditors only, and not for the benefit of the creditors generally, is not a deed requiring registration under the Act. Inasmuch as an assignment of the whole of the debtor's property for the benefit of his creditors constitutes an act of bankruptcy, an agreement to that effect cannot be safely acted upon until three months have elapsed from the date of its execution.

The deed only derives its force from the assent of all the creditors, and the assent must be expressly given. Mere attendance at the meeting of creditors where such a deed is agreed does not amount to approval, although undue delay in expressing dissent may sometimes imply an acquiescence. It is customary to appoint an accountant as trustee under the deed, and he then administers the estate, with a committee of creditors, informally on lines which are similar to bankruptcy procedure. His remuneration must be a matter of agreement. It often happens that the debtor consults such a person, who then calls the creditors together and formulates a proposal on behalf of the debtor, under which he may be appointed trustee.

A creditor who recognizes the title of a trustee under such a deed cannot afterwards set up the execution of the deed as an act of bankruptcy.

It is necessary that the deed should provide for the treatment of all creditors on equal terms; if any creditor discovers that another has received a secret advantage, he can upset the deed.

The Registrar of Bills of Sale must make weekly returns, and every trustee must make an annual return to the Inspector General in Bankruptcy of the Board of Trade of his receipts and payments, as proceedings under deeds of arrangement are included in the Annual Report of the Board.

The trustees' abstract of receipts and payments to be transmitted to the Board of Trade are required to be in the prescribed form, and must include receipts and payments, trading account where the trustee carries on the business, petty expenses, realizations, payment of dividends or compositions, and joint and separate accounts where the deed is executed by a partnership. Where there have been no receipts or payments, the trustee must make an affidavit to that effect, and he must also swear to his final account. (The Register of Deeds may be searched by anyone on payment of one shilling.)

INSOLVENCY AND SEQUESTRATION IN SCOTLAND

Introductory

Under the generic term Bankruptcy, Scots Law recognizes three successive stages, in each of which the debtor's relation to his estate and to his creditors respectively differs, viz.: (1) Simple insolvency; (2) public insolvency or "notour (i.e. notorious) bankruptcy"; and (3) sequestration or divestiture

of the bankrupt and distribution of his estate among his creditors. Simple insolvency in Scotland differs from public insolvency and from sequestration in that, unlike them, it is not a *status* fixed by any public legal criterion, but is dependent on the circumstances of each individual case, and is therefore incapable of exact legal definition.

Insolvency

Whenever a debtor comes to a point at which he can no longer pay his way, according to the obligations he has undertaken, he is insolvent, and it is immaterial whether the cause of his insolvency has arisen from actual want of funds or from the fact that his assets are unrealizable. So soon as the state of insolvency has arisen, the law assigns the debtor a definite position and gives his creditors certain rights with regard to his property. When a person becomes insolvent he becomes, according to Scots law, to all intents and purposes a mere trustee of his property for behoof of the general body of his creditors, and any fraudulent alienation of his estate which he may make to the prejudice of his creditors is reducible, either at common law or by statute. At common law any preference granted by an insolvent to a favoured creditor, any donation to a friend, or, in short, any act, such as the endorsation of a bill or delivery order or the granting of any additional security or advantage whatever, by which the insolvent prevents or defeats a fair and equitable division of his estate among his creditors, will be reduced or set aside. Under the Statute of the Scots Parliament of 1621, c. 18, all alienations of whatever kind made by an insolvent to any "conjunct and confident" person, without true, just, and necessary cause, and without a just price really paid, are null and void. By "conjunct" persons are meant relatives, either by blood or affinity; while a partner, a confidential man of business, and a servant or other dependent are examples of "confident" persons. By another act, of 1696, c. 5, all voluntary dispositions, assignations, and other deeds made or granted by an insolvent, either at the date of his becoming notour bankrupt (i.e. publicly insolvent) or within sixty days before that event, to any of his creditors by way of further satisfaction or security of their debts in preference to his remaining creditors, are declared to be null and void. The object of this statute is to preserve equality among an insolvent's creditors by restoring to the estate for the benefit of all interested any asset, whether heritable or moveable (i.e. real or personal), which, by having been alienated in satisfaction or security of a prior debt within sixty days of public insolvency, has disturbed the equal distribution of the insolvent's assets. As interpreted by the Courts, it may be said that under the provisions of the Statute, any act whatever affecting an insolvent's estate, whereby the equality of the distribution of his assets amongst his various creditors is disturbed, will be set aside. What, in other words, was intended by the Statute was to disable a debtor, whose insolvency is public or declared, from spontaneously entering into some new transaction with a favoured creditor wherein, in lieu of or in substitution for regular payment of a debt in cash, the debtor grants and the creditor receives a transference of some other funds or effects forming part of the debtor's estate. The Act does not, therefore, strike at (1) cash payments legally exigible; (2) transactions in the ordinary course of trade, such as payments or other operations in the course of an account current between two merchants or between a banker and his customer; and (3) what are known as *nova debita*, or transactions in which for a real and adequate price paid or consideration given the bankrupt conveys a specific subject to a person from whom he receives such equivalent value.

Notour Bankruptcy

When acknowledgment of a debtor's insolvency is made public in manner determined by statute, he is said to be "notour" bankrupt. Notour bankruptcy is thus simply acknowledged or public insolvency. When accompanied by certain judicial proceedings for the divestiture of the bankrupt in favour of his creditors, this public insolvency is termed Sequestration. Notour bankruptcy is constituted under the Bankruptcy Act of 1856, by (1) sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland; or (2) by insolvency concurring either with a duly executed charge (i.e. a legal demand) for payment, followed, (*a*) where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor, or by his flight and absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence; or, (*b*) where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects, not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables (i.e. personalty), or by decree of adjudication for payment, or in security of any part of his heritable estate, or by sale of any effects belonging to the debtor, under a poinding or under a sequestration for rent, or by his retiring to the sanctuary for twenty-four hours, or by his making application

for the benefit of *cessio bonorum*. By the Debtors Act of 1830, as amended by the Civil Imprisonment Act of 1882, imprisonment for debt was abolished in Scotland, except in respect to debts incurred for taxes, fines, or penalties due to His Majesty, or for rates and assessments lawfully imposed. The Act of 1880 introduced another method of constituting notour bankruptcy, which is now of practically universal use, though its application is limited to those cases in which, under its provisions, imprisonment has been rendered incompetent. Where the Act applies, notour bankruptcy is constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or competent (as under a decree pronounced *in foro* (i.e. not in absence) in the Small Debt Court), by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made. The notour bankruptcy of a firm or company is constituted either in one of the modes prescribed by the Act of 1856, or by any of the partners being rendered notour bankrupt for a company debt. Since in Scots law a firm or company is a "person" separate from the members of which it is composed, and as a firm cannot by its nature be imprisoned, the mode prescribed by the Act of 1880 does not apply to such debtors. The chief effects of notour bankruptcy arising under statute or at common law relate to (1) the invalidating of preferences, which has already been considered; (2) the equalization of diligence, and (3) the liability to sequestration. As regards the equalization of diligence, the effect of notour bankruptcy is to make all arrestments and poindings which shall have been used within sixty days prior to its constitution, or within four months thereafter, rank *pari passu* as if they had all been used of the same date. All creditors therefore of a debtor who is notour bankrupt, who have used any kind of legal diligence either within sixty days before its constitution or within four months thereafter, rank equally upon his estate according to their respective rights and preferences. As regards liability to sequestration, any debtor subject to the jurisdiction of the Supreme Court of Scotland, whether an individual or a company, who has been made notour bankrupt, and who has resided or had a place of business in Scotland within a year before the date of the petition, is liable to sequestration without his consent, provided the petition is presented within four months of notour bankruptcy, which for this purpose may be constituted as often as the creditor may wish.

Proceedings to Obtain Sequestration

Sequestration is the setting apart in neutral custody of property which is the subject of competing claims. In bankruptcy, sequestration is based on the broad equitable principle that so soon as a debtor becomes insolvent his estate belongs to his creditors, for whom, until divestiture takes place, he is to all intents and purposes a mere trustee. The leading Statute, on which the English Bankruptcy Act was largely modelled, is the Bankruptcy (Scotland) Act, 1856.

Debtors Liable to Sequestration

With the exception of companies registered under the Companies Acts and Railway Companies, every person or class of person against whom notour bankruptcy may be constituted is liable to sequestration. In the case of any living debtor who is subject to the jurisdiction of the Supreme Court of Scotland, sequestration may be awarded either (1) on the debtor's own petition, with the concurrence of a creditor or creditors, qualified as after stated; or (2) on the petition of a creditor or creditors, qualified as after stated. In the former case it is not necessary that the debtor should be notour bankrupt or even insolvent; in the latter the debtor must be notour bankrupt, and within a year before the date of the presentation of the petition, have resided, or had a dwelling house or place of business, in Scotland. Sequestration of the estates of a deceased debtor may competently be awarded where the debtor, at the time of his death, was subject to the jurisdiction of the Supreme Court of Scotland, either (1) on the petition of some person to whom he had granted a mandate to apply for sequestration, or (2) on the petition of a qualified creditor or creditors. In the latter case the petition may be presented any time after the debtor's death, but no sequestration can be awarded until the expiration of six months from that date unless the debtor was, at the date of his death, notour bankrupt, or unless his successors concur in the petition or renounce the succession. A firm or company may be sequestrated although all or some of the partners remain solvent, and *vice versa*, in which case the creditors are entitled to demand from the solvent partners any balance which may remain unpaid from the partnership funds. For the purposes of the Bankruptcy Acts, a person is subject to the jurisdiction of the Supreme Court if he (*a*) has resided continuously in Scotland, (*b*) has resided for forty days continuously in Scotland, or (*c*) owns heritage (i.e. realty) in Scotland.

Courts which may Award Sequestration

Sequestration may be awarded either by the Court of Session (the Supreme Court), or by the Sheriff (i.e. the County Court Judge) of any county in which the debtor for the year preceding the date of the petition has resided or carried on business, or in which the debtor, if deceased, for the year preceding his death resided or carried on business. No sequestration can, however, be awarded by any court after production of evidence that sequestration has already been awarded in another Court and is still undischarged. Where sequestration has been awarded by the Sheriffs of two or more counties, the later sequestration may be remitted to the Sheriff of the county in which the sequestration first in date was awarded. An appeal to the Court of Session is competent against the deliverance of a Sheriff refusing a petition for sequestration.

Qualification of Petitioning or Concurring Creditors

The petition may be at the instance, or with the concurrence, of any one creditor whose debt amounts to not less than £50, of any two creditors whose debts amount together to not less than £75, or of any three or more creditors whose debts together amount to not less than £100. Along with the petition there must be produced an oath (i.e. an affidavit) in the same terms as that, afterwards explained, with reference to claims for voting, and also the account and vouchers necessary to prove the debt.

Interim Preservation of Estate

The Court to which the application is presented may, on special application by a creditor, give orders for the immediate preservation of the estate, either by the appointment of a judicial factor (i.e. a person somewhat analogous to the English Receiver), or by such proceedings as may be requisite.

Proceedings in the Sequestration

First Meeting of Creditors and Election of Trustee.—In the judgment awarding sequestration a meeting of the debtor's creditors is appointed to be held, at a specified time and place, for the election of a trustee. To enable a creditor to take part in this election he must attend, personally or by deputy, and produce an affidavit as to the verity or truth of the debt claimed, and produce the vouchers proving the debt referred to in his affidavit. The creditors then proceed to the election of a trustee or trustees. In the event of a competition for the office of trustee the Court will confirm that person who has a majority in value, even though a minority in number, of the creditors present supporting him, for the reason that the control of the administration of the estate is given to those who have the preponderating interest in it. Creditors in possession of securities for their debt are allowed to vote only in respect of the balance after deducting the value of such securities. Thus a creditor holding (say) an assignation to a policy over the debtor's life must, before voting, put a value on such security, deduct the same from his claim, and vote only in respect of the balance. Similarly where the creditor holds the security of any person bound as a co-obligant with the debtor, he must value such security, deduct the value from his debt, and vote only in respect of the balance. The rules with respect to voting and the valuation of securities are too technical for consideration here. To secure, however, that a fair valuation is put upon all securities, provision is made that the trustee or a majority of the creditors may demand from the creditor a conveyance of the security at the price at which it is valued, plus 20 per cent. Although the meeting may elect as trustee the candidate who has the largest support in value of the creditors present, those creditors who oppose his election may appeal to the Sheriff, in respect of (*a*) the qualifications of the voters, (*b*) the qualifications of the candidate, or (*c*) the irregularity of the proceedings. The Sheriff hears parties *viva voce*, and his decision is not subject to appeal. At this meeting also the creditors fix a sum which the trustee must find as security for his intromissions and the performance of his duties. They also elect three commissioners, who superintend the proceedings of the trustee, generally advise and assist him in the recovery and realization of the assets of the estate, audit his accounts, and fix his remuneration.

The Trustee, his Duties and Responsibilities.—After his election the trustee lodges in Court his bond of caution or security, and the Sheriff then confirms his election and grants warrant for the issue of an Act and Warrant of confirmation, the effect of which is to transfer to and vest in the trustee for behoof of the creditors all right, title, and interest in the debtor's whole property, heritable and moveable, real and personal, whether in Scotland or in England and Ireland. As soon as may be after his confirmation, the trustee takes possession of the bankrupt's estate and effects, and of his title-deeds, books, bills, vouchers, and other papers and documents. Thereafter he makes up

an inventory of the estate and effects, and a valuation showing the estimated value and the annual revenue thereof. Following upon this, his duty is to manage, realize, and recover the estate belonging to the bankrupt, and to convert it into money in accordance with the directions given by the creditors at any meeting, or if no such directions be given, then with the advice of the commissioners. He must lodge all moneys ingathered by him in such bank as the creditors, by a majority in number and value, may appoint; and if he retains in his hands any sum exceeding £50 for more than ten days, he must pay interest on the excess over £50 of 20 per cent, becomes liable to dismissal from his office, forfeits all claim to remuneration, and is liable in expenses or costs. The trustee is remunerated by a fixed commission on the amount of the assets ingathered by him, the percentage, which is usually 5, being fixed by the commissioners. The trustee, any of the creditors, or the bankrupt may appeal against the rate fixed to the accountant of Court, and, if dissatisfied with his determination, to the Court of Session, or to the Sheriff, whose decision is final. A majority in number and value of the creditors present at any meeting duly called for the purpose may remove the trustee without assigning any reason, though an appeal to the Court of Session or the Sheriff is competent against the decision. He may also be removed by petition of one-fourth of the creditors to the Court of Session, for neglect, misconduct, or malversation of duty. If the trustee dies, resigns, is removed, or remains out of Scotland for three months consecutively, any commissioner or creditor may apply to the Sheriff for an order to hold a meeting for the purpose of electing a new trustee or devolving the office on the trustee next in succession.

Examination of the Bankrupt.—Within eight days after his confirmation, the trustee applies to the Sheriff to name a day for the public examination of the bankrupt. A diet is accordingly fixed by the Sheriff, and a notice thereof is posted to each creditor who has lodged a claim, or who is named in the bankrupt's state of affairs. The trustee may also apply to the Sheriff to order the examination of the bankrupt's wife, family, servants, clerks, solicitor, and any others who may be in a position to furnish information with regard to his estate. The object of the examination is to ascertain what the bankrupt's estate consists of, where it is, and what he has done with it or to affect it. Questions may be put to the bankrupt or any of the witnesses by the trustee, the Sheriff, or, with the sanction of the Sheriff, any creditor. The bankrupt finally emits the statutory declaration on oath, deponing to the full disclosure of his estate and affairs, which is engrossed in the sederunt book and subscribed by him and the Sheriff.

Vesting of Estate in Trustee.—The granting of the Act and Warrant in favour of the trustee vests in him the whole "property" of the debtor, with all right, title, and interest therein. The broad general rule is that the property which vests in the trustee does so *tantum et tale* as it stood in the bankrupt, and subject to all exceptions pleadable against him. The property, therefore, which passes to the trustee is that in which the bankrupt has a beneficial interest, and which the law allows him to dispose of, to the extent of that beneficial interest. It does not include property held by the bankrupt on trust, or that in which he has no beneficial interest and cannot dispose of without committing a fraud. Included in "property" is (1) heritable or real estate in Scotland, England, or Ireland; and (2) movable or personal estate wherever situated; (3) *acquirenda* or estate of any kind which, after the date of the sequestration and before the bankrupt has obtained his discharge, is acquired by him, or descends, reverts, or comes to him by donation or otherwise, as to which the bankrupt must make immediate notification to the trustee; (4) government pay, pension, or salary, the bankrupt being entitled to retain only so much as may give him a competency; (5) rights of action, to institute and maintain which the trustee has all the powers and rights which the bankrupt had; and (6) contracts, it being in the trustee's option to adopt or repudiate contracts entered into by the bankrupt as he thinks proper.

Distribution of the Estate — Ranking. — The divisible fund, which consists of the proceeds of the sequestrated estate when realized and converted into money, after payment of the necessary expenses, falls to be distributed among those who were creditors of the bankrupt at the date of the sequestration, ranked according to their several rights and interests. Creditors in right of preferable securities over the estate must be paid in full in the first place, without deduction of expenses, before the estate can be claimed by the trustee. Immediately on the expiration of four months from the date of the deliverance awarding sequestration, the trustee must make up a statement of the whole estate of the bankrupt, of the funds recovered by him, and of the property outstanding (specifying the cause why it has not been recovered), and also an account of his intromissions, and generally of his management. The commissioners thereafter meet, and, among other things, declare whether any and what part of the estate is to be divided among the creditors. Similar procedure must be followed on the expiration of every four months thereafter, in order that a dividend may

be declared and paid (if funds remain to pay it) every three months from the day of payment of the immediately preceding dividend, until the whole fund for division is exhausted. To entitle a creditor to draw a dividend, he must lodge in the sequestration process, or at a meeting of creditors, or in the hands of the trustee, an oath or affirmation, and produce such accounts and vouchers as are necessary to prove the debt therein referred to, to the effect before explained with reference to claims for voting. The following general rules with regard to ranking may be referred to:—To enable a creditor who holds a security over any part of the bankrupt's estate to be ranked in order to draw a dividend, he must on oath put a specified value on such security, deduct the same from his debt, and specify the balance. Upon the amount of such balance, and no more, he is entitled to be ranked and to receive a dividend without prejudice to the amount of his debt in other respects. The reason for this rule is that the creditor, by virtue of his security, has appropriated a part of the estate which, but for his security, would be divisible amongst the general body of the creditors. It is only, however, where a creditor claims as an ordinary creditor that securities require to be deducted, no deduction of securities being required in the case of creditors claiming preferences. As a check upon undervaluation, the trustee is entitled, at the expense of the estate and on payment out of the common fund of the value specified by the creditor, without the deduction of 20 per cent as in the case of voting, to a conveyance or assignation of any security over the bankrupt's estate held by a creditor, or alternatively to reserve to the creditor the full benefit of any such security. The creditor is entitled, on giving notice to the trustee, to realize his security, in which case he deducts the amount received from his claim. In accordance with the rule of Scots law, already explained, creditors of a bankrupt firm of which the partners are also bankrupt, are entitled to rank on the partnership estates to the entire exclusion of the private creditors of the partners, and also to rank equally with the private creditors on the individual estates of the partners, after deducting the amount they are entitled to receive out of the firm's estate. Before ranking a creditor on the estates of an individual partner, it is the duty of the trustee to put a valuation on the creditor's claim on the estates of the firm, deduct from the claim such estimated value, and rank and pay the creditor a dividend only on the balance. If dissatisfied, the creditor has a right of appeal to the Sheriff. Where a person carries on business under a company name, no distinction is, on his bankruptcy, made between his private and his trade creditors, who all rank equally on the funds available for division. Where a partner of a solvent firm becomes bankrupt, his creditors have a right to his share of capital and profit in the firm; but as every partner is liable for the whole debts of his firm, the creditor's interest in the firm's estate can only emerge after provision is made for the payment of the whole debts of the firm. A creditor of a solvent company can have no claim on the estate of a bankrupt partner, since he would require to value the obligation of the firm, which of necessity would be at 20s. in the £. In claims for ranking, unlike those for voting, a creditor who holds an obligant bound with, but liable in relief to, the bankrupt, does not require to value and deduct the obligation of such party in ranking upon the bankrupt estate, being entitled to rank, and draw a dividend for the full sum due to him. Where a creditor claims on a number of bills held by him, he cannot apply the surplus on one bill in relief of the deficit on another. Where ordinary trade bills are lodged in security of a debt, and the principal debtor becomes bankrupt, the creditor is entitled to rank on his estate for the full amount of his claim without deduction, and thereafter to call upon the parties to the bills to make good the deficiency. In the event of the parties becoming bankrupt, the creditor is entitled, to enable him to get full payment of his debt with interest, to rank on their estates for the full sum appearing on the face of the bills, irrespective of the amount of his debt. If, however, he gets more in this way than the amount due to him, he will hold the surplus as trustee for the party from whom he received the bills. It is a general rule of bankruptcy law that the same debt cannot be twice ranked for on the same estates, either by the original creditor or anyone claiming through him. This is known as "double ranking". Thus, if a creditor claim upon the principal debtor's estate, a cautioner (i.e. a surety or guarantor) who may have paid the difference between the creditor's ranking and the amount guaranteed, cannot rank on the principal debtor's estate for the sum so paid by him. Thus, e.g. in the case of a guarantee for an overdraft with a bank, where the principal debtor becomes bankrupt and the bank claim on his estate for the full amount due and receive a dividend, the surety is not entitled, upon paying the difference, to rank on the principal debtor's estate for the amount so paid. A similar rule applies in the case of accommodation bills, since a person who lends his name for the accommodation of another is, so far as that other is concerned, merely a surety for payment of the amount of the bill. When the claim of a creditor depends on a contingency, which is unascertained at the date of lodging his claim, he

is not entitled to vote or draw a dividend in respect of such contingent debt. He may, however, apply to the trustee or the Sheriff to put a value on such debt, and on such value being fixed, he may vote and draw dividends in respect of the amount of his debt. So in the case of an annuity, on which a value must be put before the creditor can draw a dividend in respect of his claim.

Division of Estate—Payment of Dividends.—Within fourteen days after the expiry of four months from the date of the deliverance awarding sequestration, the trustee must examine the various claims with a view to their admission to a dividend, and either allow them, reject them, or require further evidence in their support. He then notifies the date and place where the first dividend will be paid to those creditors whose claims have been admitted. Any creditor who is dissatisfied with the determination of the trustee with respect to his claim may appeal to the Sheriff. A creditor whose claim has been rejected for the first dividend may lodge it again for a second or subsequent dividend. Second and subsequent dividends are paid on the expiration of every four months until the whole estate is exhausted. When the whole estate is exhausted, the trustee, by petition to the Sheriff, obtains his formal discharge, and the sequestration proceedings are then at an end.

Discharge of Bankrupt

There are three methods by which the bankrupt may obtain his discharge: (1) under a deed of arrangement with the creditors, (2) on payment of a composition on his debts, or (3) by payment of dividends.

Deeds of Arrangement.—At the meeting for the election of the trustee, or at any subsequent meeting held for the purpose, a majority in number and four-fifths in value of the creditors present, or represented, at the meeting, may resolve that the estate be wound up under a deed of arrangement. The resolution is reported to the Court of Session or the Sheriff, who, if of opinion that the resolution has been duly carried and is reasonable, may grant the same. If granted, arrangements may be made by the Court or the Sheriff for the interim management of the estate. The creditors then produce a deed of arrangement subscribed by, or by authority of, four-fifths in number and value of the creditors, and by the bankrupt. If satisfied that the deed of arrangement has been duly executed and is reasonable, the Court or the Sheriff, as the case may be, approves of it, and declares the sequestration at an end. The deed is thereafter as binding on all the creditors as if they had acceded to it, though the sequestration subsists so far as may be necessary for the purpose of preventing, challenging, and setting aside preferences over the estate. If the resolution is not duly reported to the Court, or not approved of, the sequestration proceedings are resumed as if no deed of arrangement had been carried.

Discharge of Bankrupt on Composition.—Instead of realizing and dividing the bankrupt estate among the creditors, it is competent for the creditors, with the approval of the Court or the Sheriff, to accept an offer of a composition from the bankrupt or his friends, with security for its due payment, and to reinstate the bankrupt in possession of his estate. If a majority in number and nine-tenths in value of the creditors present at the meeting for the election of the trustee, or any subsequent meeting called for the purpose, resolve that an offer of a composition from the bankrupt or his friends, with security for its payment, should be entertained for consideration, the trustee advertises the fact in the *Gazette*, and intimates that it will be decided upon at a meeting to be held after the bankrupt's examination. He also transmits a letter containing a copy of the resolution to each creditor; intimates the time, place, and hour at which the meeting will be held; specifies the offer and security proposed; and gives an abstract of the state of affairs and of the valuation of the estate. If, at the meeting, a majority in number and nine-tenths in value of the creditors present accept the offer and security, a bond of caution (or security) for payment of the composition is lodged in the hands of the trustee, who submits it for approval to the Court or the Sheriff, whichever may be selected by the trustee. If, after hearing any objections which may be offered, the Court or the Sheriff finds that the offer has been duly made, is reasonable, and has been assented to by the requisite majority, a deliverance approving of the composition is pronounced. The bankrupt then makes a statutory declaration, and is thereupon discharged and acquitted of all the debts and obligations contracted by him, or for which he was liable at the date of the sequestration, is reinvested in his estate, subject to the claims of the creditors against him and his surety for the composition, the sequestration terminates, and the trustee is discharged. In the case of a firm, the offer may be accepted as to one partner and he be discharged, while as to the others it may be refused, and the sequestration allowed to go on. After the bankrupt is discharged, the creditors' claim against him is only for the composition: if he fail to pay the composition they can sue him only for its amount; and if he be again sequestrated for its non-payment, his creditors

can rank on his estate only for its amount. The composition contract and the consequent discharge of the bankrupt may, however, be annulled or reduced on certain legal grounds, such as fraud, wilful concealment, and the granting of illegal preferences.

Discharge of Bankrupt by Dividend.—The bankrupt may, at the following stages in the sequestration proceedings, apply to the Court or the Sheriff to be finally discharged of all debts contracted by him before the date of his sequestration: (1) At any time subsequent to the meeting held after his examination, provided every creditor who has produced a claim concurs in the petition; (2) on the expiration of six months from the date of the sequestration, provided a majority in number and four-fifths in value of the creditors concur; (3) on the expiration of twelve months, provided a majority in number and two-thirds in value of the creditors concur; (4) on the expiration of eighteen months, provided a majority of the creditors in number and value concur; and (5) after the expiration of two years, without any consents of the creditors. The petition is intimated in the *Gazette* and to each creditor, and any creditor may appear and oppose the application. Before presenting the petition the bankrupt must obtain from the trustee a report with regard to his conduct, stating how far he has complied with the statutory provisions, and, in particular, whether he has made a fair discovery and surrender of his estate, whether he has attended the diet for his examination, whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortune, or losses in business, or from culpable conduct. Further, before the petition can be granted, the bankrupt must prove to the satisfaction of the Court or the Sheriff: (1) that a dividend or composition of not less than 5*s.* in the £ has been paid out of his estate, or that security for the payment thereof has been found to the satisfaction of the creditors; or (2) that his failure to pay 5*s.* in the £ has arisen from circumstances for which he cannot justly be held responsible. In the event of the application being refused, the bankrupt may at any time make another application, provided his estate has yielded 5*s.* in the £, or if he pays to his creditors such an additional sum as will, with the dividend or composition previously paid, make up such a sum. Where a firm and its individual partners are sequestrated, a discharge may be granted to the partners, as such and as individuals, or they may be discharged as partners without being so as individuals, and *vice versa*. One partner may be discharged without the others being so. The deliverance awarding the discharge operates as a complete acquittance to the bankrupt of any debt which might have been or was ranked for in the sequestration, but it does not put an end to the sequestration nor reinvest the bankrupt in his estate.

Cessio Bonorum

This is a process, competent only in the Sheriff (or County) Court, which affords an easy and inexpensive mode of realizing the estate and effects of small debtors and of dividing their estate among their creditors. It may be awarded against any living debtor who is notour bankrupt, and the debtor himself or any of his creditors may present the necessary petition, in which is inserted a list of all the creditors known to the applicant. A notice is then inserted in the *Gazette* requiring the creditors to appear in Court on a certain day, at which the debtor is ordered to appear for his examination. At least six days before this meeting the debtor is required to lodge in Court a state of his affairs and all his business books and papers. At the meeting the debtor is examined on oath by the Sheriff, or any creditor with the approbation of the Sheriff. After the examination the Sheriff may either grant judgment, ordering the debtor to execute a conveyance of all his goods and effects to a trustee for behoof of his creditors, or he may refuse the application, or do otherwise as he thinks just. The judgment operates as an assignation of the debtor's effects in favour of the trustee, who is decided upon at the meeting. After obtaining an official copy of the judgment, the trustee reports orally to the Sheriff the date when he expects the estate to be realized and ready for division, whereupon the Sheriff fixes a date for the second meeting of the creditors. This date is intimated to the creditors, who then lodge claims as in a sequestration. The claims are then examined by the trustee and the creditors ranked for dividends. At the meeting the debtor is further examined, and any objections to the trustee's deliverances on the claims are disposed of. The trustee's remuneration is fixed, and where the funds have been realized the Sheriff may order such sum as he may appoint to be paid on a specified day as an interim or final dividend to the creditors according to their various rankings, or he may postpone payment of the dividend to a date then or to be afterwards fixed. If the debtor's liabilities exceed £200, the Sheriff, if he thinks it expedient in the circumstances, may award sequestration of the debtor's estate instead of cessio. The debtor is entitled to apply for his discharge at the same times and on practically the same conditions as in a sequestration. The Sheriff's decision with respect to the discharge is

not subject to appeal. After the final distribution of the estate the trustee obtains his discharge and the cessio is at an end.

Extrajudicial Settlements with Creditors

Trust Deeds.—The estates of embarrassed debtors may be realized and divided among their creditors under a private trust deed without resort to the judicial processes of sequestration or cessio, a course which, if the creditors are unanimous, is in many ways preferable to either of the former methods. The trust is usually constituted by means of a trust deed, granted by the debtor, conveying his whole estate and effects, real and personal, to a trustee for behoof of his creditors. Such a deed, if granted for behoof of all the creditors equally, and containing no extraordinary clauses, is irrevocable by the grantor and is binding on the creditors, both acceding and non-acceding, if the estate is reduced into possession of the trustee, and the debtor is not rendered notour bankrupt within sixty days thereafter. As a trust deed is a voluntary agreement, it follows that no creditor is bound by its terms unless he has specially assented thereto. That consent may be proved by writing or by oath, or in some cases, verbally. Notwithstanding the trust deed the radical right of property remains in the debtor, and he is entitled to any reversion there may be after the purposes of the trust have been satisfied, and to compel the trustee to account to him. He is also entitled to his discharge, if that has been stipulated for and agreed to. The creditors, having assented to the deed, are barred thereafter from suing for their debts. They are entitled to see that the estate is realized and equitably divided among them, and they may take proceedings to set aside illegal preferences granted by the debtor. The trustee is bound by the powers conferred upon him by the deed, but he is entitled to take all necessary steps for the realization of the estate, and thereafter to rank the creditors and pay them dividends according to their respective rights and interests. Sworn affidavits in support of the creditors' claims are not necessary, and the creditors are ranked, in the absence of express provision, not as in a sequestration, but by the rules of the common law, of which the most important is that securities do not require to be deducted. The creditor, therefore, who holds a security over the bankrupt estate may exhaust that security, and thereafter rank equally with the unsecured creditors on the remainder of the insolvent's estate, not merely for the balance, but for the full amount of his debt, so as to operate payment in full. Most trust deeds, however, provide that creditors are to be ranked according to the principles of the Bankruptcy Acts, which have already been briefly explained.

Composition Contract.—Where it is desirable to allow a debtor to remain in possession of his estate and to carry on his business, instead of divesting him in any of the modes already considered, his creditors may enter into an extrajudicial composition contract, to allow the debtor such time as the creditors think proper for the payment of their debts or the acceptance of a composition. This composition contract is usually carried out by the debtor, or someone on his behalf, offering the creditors a sum in settlement of their debts, in one or more payments, under certain specified conditions, which include a stipulation for the debtor's discharge, and the granting of bills in security for the payment of the stipulated composition. It is illegal for the debtor secretly to come under an obligation to give one or more of his creditors a preference on condition of acceding to the composition, and payment cannot be exacted by a creditor to whom such preference is given. As the contract is a mutual one, a creditor cannot be compelled to accept a composition, nor can he be bound by any composition arrangement unless he has specially consented to it.

BANKRUPTCY IN IRELAND

In what is said below, no attempt is made to do more than indicate the main differences between the law and practice in Ireland in insolvency and the same law and practice in England; and this article is to be read as supplementary to that on Bankruptcy in England; and when technical terms are used which mean the same thing in both countries they are explained above.

When a person domiciled in Ireland finds himself insolvent there are two possible means, apart from a release by agreement with his creditors, by which he may be freed from his liabilities and get a fresh start. First of all, a petition may be presented either by the debtor himself or by a creditor, under the conditions set out below, asking that the debtor be adjudged bankrupt; and if the prayer of this petition be granted, all the debtor's property, real and personal, is taken possession of by the Court and distributed amongst his creditors rateably with the amount of their debts. In con-

sideration of this surrender of his property, if certain conditions are fulfilled, the bankrupt is granted a certificate setting forth that he has conformed to the law of bankruptcy, and thenceforth he is discharged from the debts due by him at the date of his bankruptcy, with a few unimportant exceptions. But so long as he remains a bankrupt all property that he may become possessed of or entitled to is taken by the Court for his creditors.

In the second place, without incurring the disabilities of bankruptcy, the insolvent may petition the Court, asking that his property may be protected from execution at the suit of any creditor, until he submit to his creditors, under the supervision of the Court, a proposal for compounding his debts; and if the creditors, by the majority required by statute, agree to accept the proposed composition, and such composition, having been approved by the Court, be carried out by the debtor, again the Court will grant the debtor a certificate of conformity, which will operate in the same way as the certificate in bankruptcy, to release the debtor from his liabilities. This method of obtaining relief is called an arrangement under the control of the Court.

Courts Exercising Jurisdiction in Insolvency

The Courts exercising jurisdiction in Ireland both in bankruptcy and arrangements are: (1) The King's Bench Division of the High Court of Justice, which has jurisdiction over debtors in every part of Ireland, but sits only in Dublin; (2) the Local Bankruptcy Courts created under an Act of 1888. These Courts have a jurisdiction within their geographical areas concurrently with the King's Bench Division. There are at present two such Local Courts: one at Belfast, with jurisdiction in the counties of Antrim, Down, and Armagh, and the city of Belfast; the other at Cork, with jurisdiction in the county and city of Cork. The Recorders of Belfast and Cork are the local judges. There is power to create other Local Bankruptcy Courts, but it has so far not been exercised.

From both the King's Bench Division and the Local Courts there is an appeal to the Court of Appeal, and in most matters, thence to the House of Lords.

Arrangements

The first step in an arrangement is the presentation of a petition by the debtor, and thereupon the Court grants protection from process, which will be extended from time to time until the debtor's proposal is finally accepted or rejected. Having obtained this protection, the debtor must, within one week, call a "preliminary" meeting of his creditors, to be held at the office of his solicitor, or other convenient place, of which four days' previous notice must be given by post to all his creditors, and to the solicitor of any creditor who has taken proceedings against him. This meeting is presided over by some creditor elected by the meeting, and the debtor must attend and present a statement of his affairs, the object being, in the words of Judge Miller, "the investigation as to the representation of the trader as to his affairs, and the reasonableness of the composition offered upon the basis of such representation".

Meetings before the Court

Upon the grant of protection the Registrar fixes a time for the first meeting of creditors before the Court, or first private sitting as it is called. Ten days at least before the date so fixed, the debtor must file a statement of his affairs in the prescribed form in the office of the Court: ten days' notice of the first private sitting must be given to every creditor named in that statement; and such notice must contain a copy of the proposal of composition made by the debtor. At the first sitting every creditor may attend personally or by proxy, and on filing the prescribed proof may vote on the proposal. If a majority of three-fifths in number and value of the creditors who vote and are also creditors for £10 at the least assent, the proposal is carried, and thereupon the Court appoints another day, not earlier than fourteen days from the first sitting, for the second sitting, to consider the confirmation of the proposal so carried. The debtor's proposal may be altered and amended in any way at the first sitting, but at the second sitting the proposal can only be accepted or rejected, and cannot be modified. Ten days' notice must again be given. The proposal is voted upon again in the same manner, and if carried by the same majority, and not rejected by the Court itself as not being reasonable and proper, it becomes binding on all creditors who had notice of the proceedings. If duly carried out by the debtor, he gets a certificate of conformity, which is a discharge as in bankruptcy.

Failure to Carry Proposal

If the debtor fail to obey the rules or orders of the Court, his petition is dismissed, and such dismissal is an act of bankruptcy upon which a petition of bankruptcy may be presented against him. But if he fail to obtain the necessary majority for his

proposal at his first sitting, then the Court will at once adjudicate him bankrupt; and the same thing happens if the Court pronounce his proposal not reasonable and proper.

Failure to Carry Out Proposal

If the debtor fail to carry out the proposal accepted by the creditors, then each creditor is put into the same position as before the arrangement; subject to this, that if such creditor have rights under the proposal, e.g. hold a bill with the name of a surety on it, he may pursue those rights, or be remitted to his original rights, but he cannot have it both ways.

Bankruptcy

In Ireland a man, or a woman trading separately from her husband, may petition to be adjudged bankrupt, and this is very usually done; or any creditor to whom the debtor owes £40, or any two or more creditors to whom the debtor owes £40, may petition for the bankruptcy of their debtor, provided they can prove that the debtor has, within six months, committed an act of bankruptcy. The acts of bankruptcy in Ireland are the same as in England, except that: (1) a fraudulent preference (see p. 117) as such is not in Ireland an act of bankruptcy; (2) instead of a judgment summons (see p. 101) the procedure in Ireland is by what is called "debtor's summons". By this process any creditor to whom a man owes £20 may, after serving his debtor with particulars of his demand, but without obtaining any judgment for his debt, sue out a debtor's summons, requiring the debtor to pay the debt within seven days if the debtor is a trader, or within three weeks if not a trader. This summons having been duly served, if the debtor do not, within the time limited, pay, secure, or compound for the debt to the satisfaction of the creditor, then the debtor commits an act of bankruptcy upon which that creditor, but no other, can petition.

Adjudication

Upon presentation of a petition and proof of an act of bankruptcy by the debtor, and the existence of a debt or debts of £40, the debtor is at once adjudicated bankrupt. These proceedings are *ex parte*, but the order of adjudication must be served on the debtor, and he has three days within which to show cause against it, which he can do by disproving the debt or act of bankruptcy. But should cause not be shown, or cause shown fail, the adjudication is at once gazetted.

Effect of Adjudication

So far as the property of the bankrupt is concerned, the effect of adjudication is the same as in England (see p. 114), with two important exceptions. All real and personal property vested in the bankrupt from the time to which the assignees' title relates back, or which he may acquire by gift, purchase, or descent before he obtains his certificate is, as in England, taken from him, and vests in an official of the Court, called the Official Assignee, and a person chosen by the creditors, called the Creditors' Assignee, for realization, and the distribution of the proceeds amongst his creditors; but (1) lands held for ever or for a term of years at a rent do not vest in the assignees until they elect to take the same, such election being express under the hand of the assignees, or implied by the Court from acts of the assignees only consistent with an election to take; and (2) chattels in the reputed ownership (see p. 116) of the bankrupt do not immediately become vested in the assignees, but only become available for the creditors upon an order of the Court declaring them to be in such reputed ownership, and directing them to be sold by the assignees.

Provision has been made in the Irish Bankruptcy Code for the conduct of a bankruptcy by a trustee and committee of inspection, as in England, instead of by the official and creditors' assignees, but that course is in practice almost never followed.

Relation Back of the Assignees' Title

The title of the assignees to the property of the bankrupt—

(*a*) Where the bankrupt is adjudicated on his own petition, or where an arrangement matter is turned into bankruptcy (see supra), dates from the adjudication.

(*b*) Where the adjudication is had on a creditor's petition, dates from the act of bankruptcy upon which the adjudication is had; *or*, if the bankrupt is proved to have committed more acts of bankruptcy than one, then from the first of the acts of bankruptcy proved to have been committed within six months of petition; *but* there is no relation back beyond the time of the contracting of the debt due to the petitioning creditor.

The result of this doctrine of relation back gives very important rights to the creditors, for under it the assignees can recover any property the bankrupt has been possessed of from the date of the accrual of the assignees' title, unless the transaction by which the bankrupt parted with it is a transaction protected by Sec. 328 of the Act of 1857, as having been entered into *bona fide* by a person

having no notice of any prior act of bankruptcy committed by the debtor.

Summons to Appear and Conform

Immediately after the expiration of the time limited for showing cause against the adjudication, or after the disallowance of any cause shown, the solicitor for the petitioning creditor takes out, and has served upon the bankrupt, a summons requiring him to appear at two public sittings of the Court, and to make a full and true disclosure of all his estate. The summons specifies the dates of the sittings, the second of which must be on a day not less than twenty, and not more than forty days from the gazetting of the adjudication; and the bankrupt is required, at latest on the day before the first of such sittings, to file in Court a statement of his affairs in the prescribed form verified on oath.

Sittings before the Court

The first business to be transacted at the first sitting is the election of a creditors' assignee, and as the general direction of the bankruptcy proceedings lies with the creditors' assignee, who, though he himself acts without remuneration, yet has the right to nominate the solicitor to have carriage of the proceedings, there is sometimes a keen competition for the appointment. Should more than one person be nominated in any case, then the creditors whose debts have been proved vote either personally or by a proxy nominated in writing, and the candidate supported by a majority in value of the voting creditors is elected, unless good cause is shown to the satisfaction of the Court why he should be rejected. At the first sitting also the bankrupt may be, and always is, examined upon oath by the counsel for the assignees as to his estate, his debts, and trading, or any matter upon which information is desired by the assignees or any creditor. At the second sitting the bankrupt may be further examined; if no further information is then required of him the sitting is passed; but it may be adjourned to any subsequent day, and the bankrupt must then again attend.

Proof of Debts

Debts are usually proved by an affidavit in the prescribed form, lodged with the Registrar of the Court, and if not then disputed the creditors so proving are entered on the list for dividend; but any creditor may be required to attend personally, and so prove his debt. The same classes of debts are provable in Ireland as in England (see p. 119) and in the same way, with this exception, that claims sounding in damages are only provable on either the creditor or the bankrupt moving the Court to have such damages assessed. Should neither the creditor nor the debtor move to have such damages assessed, then no dividend is payable in respect of that claim, and the certificate of the bankrupt, when obtained, is no bar to an action by such a creditor against the bankrupt in respect of damages for breach of a contract, whether such breach occurred before or after the adjudication.

Realization and Dividend

Upon adjudication the official assignee may at once realize perishable assets, and after the appointment of the creditors' assignee, the official assignee, under the direction of the creditors' assignee, proceeds to realize all the assets of the bankrupt, and as funds come to their hands the assignees may declare dividends until the whole has been realized and paid over to the creditors, less, of course, the costs of the proceedings. Where debts are admitted by the bankrupt in his statement of affairs to be due to creditors who cannot be found, the dividend payable to such creditors is carried to a fund called the Unclaimed Dividends Fund.

Preferential Debts

These are in Ireland practically the same as in England (see p. 121).

Secured Creditors

Creditors of an insolvent who hold security from him for the amount of their debts are not bound to take any part in the bankruptcy or arrangement. Such creditors have four courses open to them: (1) They may remain outside the proceedings altogether, rest on their security, and realize the same in such way and at such time as they see fit, and have the right; (2) they may abandon their security and prove for the full amount of their debts; (3) they may realize their security pending the proceedings, and then prove for the realized deficiency, if any, of their debts; (4) they may estimate the value of their security and then prove for the estimated deficiency and receive dividends thereupon. Should such creditors adopt this course, then the assignees may redeem upon payment of the estimated value; but if that is not done, then, at whatever time the security may be realized, should the security realize more than the estimated value, the creditors must pay over such excess to the assignees or the arranging debtor as the case may be; but should the security not realize the esti-

mated value, then the creditors must themselves bear the loss, and cannot increase the amount of the proof already made.

Composition after Bankruptcy

Instead of allowing the realization of his estate by the assignees to proceed, a bankrupt may at any time, by a ten days' notice specifying the offer he is prepared to make, call a meeting of his creditors before the Court; and if at that meeting a three-fifths majority in number and value of creditors voting personally or by proxy, whose several debts are over £20, accept the proposal, or any modification of it, then the offer so accepted is submitted to a second meeting called in the same way; and if the same majority then confirm that acceptance, such acceptance becomes binding upon all the creditors. Thereupon the bankrupt is again put into possession of his estate, and if the offer is duly carried out, the adjudication originally had is annulled. Should, however, the proposal not be duly carried out by the debtor, the bankruptcy proceedings may be resumed under an order of the Court upon the application of any creditor; or the creditors may prefer to follow up their rights against any person who may have become surety for the due carrying out of the proposal. But creditors cannot both prove under the resumed bankruptcy and sue a surety for the composition.

Settlements Avoided by Bankruptcy

The Irish law differs a little from the English in respect of the settlements rendered void by adjudication. In Ireland, in the case of a bankrupt who at the date of adjudication was a trader, if he has made a settlement of property, which was not

(*a*) A settlement made before and in consideration of marriage; or

(*b*) A settlement made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; or

(*c*) A settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife;

then such a settlement is always avoided if it has been made within two years of the adjudication; and if made more than two, but less than ten years before adjudication, is also avoided unless those claiming under it can prove that the settlor was at the time of the settlement able to pay all his debts without the aid of the property comprised in the settlement. By "settlement" is meant any transfer of property. It will be noticed that in Ireland it is not necessary, as it is in England (see p. 117), for those supporting a settlement made more than two years before bankruptcy, to prove that the interest of the settlor in the settled property passed to the trustees thereof on the execution of the settlement.

If the bankrupt was not a trader a different Act of Parliament applies, and under it if the assignees can prove that at the time of the transfer of any property the bankrupt was then insolvent, and that the transfer was not made on the occasion of the marriage of any of his children or for some valuable consideration, the Court will order the property to be sold and the proceeds paid to the creditors by way of dividend.

Protected Transactions

As stated above, from the time to which the title of the assignees can relate back, all the property thenceforward belonging to the bankrupt is deemed to have been the property of his assignees in bankruptcy, and if paid away, should such property have been money, or sold or given away, should it have been any other species of property, then, the bankrupt not having any right to part with property which was not his but his assignees', the assignees could recover it back, did not the law step in. In the same way, if a debt were paid to a bankrupt after he had committed an act of bankruptcy but before he was adjudicated, the person paying could not get a good receipt from the bankrupt, because the debt was at the time of payment not his debt at all, but a debt owing to his assignees. However, it has been provided by statute that all dealings with the bankrupt and his property before the filing of the petition of bankruptcy shall stand good against his assignees, provided that the person dealing with him at the time did not know that an act of bankruptcy had been committed, or rather, in the words of the Act of Parliament, "had not notice" of a prior act of bankruptcy; and "notice" there means not merely actual knowledge, but wilfully abstaining from making reasonable enquiries for fear of acquiring such knowledge. Knowledge of facts which *must* amount to an act of bankruptcy will invalidate a transaction; but knowledge of facts which may or may not amount to an act of bankruptcy will not. Of course, the act of bankruptcy of which the person dealing with the bankrupt has notice must not be a stale act: after six months an act of bankruptcy cannot be made the foundation of a petition, and knowledge of an act of bankruptcy six months old can never invalidate a transaction even should one party to it subsequently become bankrupt.

Reputed Ownership

The law in Ireland with regard to the rights of creditors to appropriate goods in the order and disposition of a bankrupt under such circumstances that he is the reputed owner thereof is the same as in England, with three important differences. In the first place, as mentioned above, the property in such goods does not immediately on adjudication vest in the assignees; and such goods are only made available for the creditors by a special order of the Court directing them to be sold. Secondly, the English section only applies to chattels in the order and disposition of the bankrupt *in his trade or business*, but the Irish section applies to all chattels. Thirdly, by the English section "things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section"; but there is no such limitation of the meaning of "goods and chattels" in the Irish section; and the Irish Act applies to all classes of choses in action.

Disclaimer by the Assignees

Should the assignees have elected to take lands held at a rent or burdened with onerous covenants, or should part of the property vesting in them consist of unprofitable contracts or unmarketable shares in companies, the assignees may at any time disclaim the same by writing under their hands; and thereupon "the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date, and if the same are shares in any company, be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be given up to him, or make such other order as to the possession thereof as may be just. Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy." (Section 97 of the Bankruptcy (Ireland) Amendment Act, 1872.) The assignees are not allowed indefinitely to postpone such disclaimer, because any person interested may apply to the Court for an order fixing a time within which the assignees must disclaim, or be deemed to have elected not to disclaim the property. Assignees may not disclaim a lease and at the same time retain the proceeds of the sale of fixtures on the disclaimed premises; all fixtures upon disclaimed premises go in Ireland to the landlord, unless some person interested apply, as he may, to have it vested in him.

Certificate of Conformity

In Ireland, when an arranging debtor has carried out his proposal according to its tenor he is entitled to a certificate of conformity, which has the same effect as a similar certificate in bankruptcy. A bankrupt is entitled to his certificate if and when one of the following conditions is fulfilled:—

1. In a bankruptcy conducted by assignees:
   (*a*) A dividend of not less than ten shillings in the pound has been paid out of the bankrupt's property; *or*
   (*b*) His bankruptcy, or the failure to pay ten shillings in the pound, has *in the opinion of the Court* arisen from circumstances for which the bankrupt cannot justly be held responsible.
2. In a bankruptcy conducted by a trustee and committee of inspection:
   (*a*) A dividend of not less than ten shillings in the pound has been paid out of his property, or might have been paid but for the negligence or fraud of the trustee; *or*
   (*b*) A special resolution of the creditors has been passed to the effect that the bankruptcy, or the failure to pay ten shillings in the pound, has *in their opinion* arisen from circumstances for which the bankrupt cannot justly be held responsible, *and* that *they* desire that a certificate should be granted to the bankrupt.

Should the conditions precedent be fulfilled the bankrupt can claim his certificate; but the Court may suspend it for such time as it deems to be just, or withhold it altogether:

1. If a prosecution has been commenced against the bankrupt in respect of any offence committed against the Debtors Act (Ireland), 1872;
2. If the Court is satisfied that the bankrupt has not made a full disclosure of his property.

By the certificate the bankrupt is released from all debts provable under the bankruptcy, except

1. Any debt or liability incurred by means of any fraud or breach of trust, and it is to be noted that in Ireland the bankrupt need not have been a party to the fraud;
2. Any debt or liability whereof the bankrupt has obtained forbearance by any fraud;
3. Debts due to the Crown;
4. Debts due in respect of breaches of the revenue laws, or on a bail bond.

Position of Undischarged Bankrupt

The position of a bankrupt who has not obtained his certificate is in Ireland practically the same as in England, with one important exception, viz.: it is not an offence in Ireland for an undischarged bankrupt to obtain credit to any amount without disclosing the fact of his bankruptcy.

[AUTHORITIES.—*Sir R. Vaughan Williams*, "Law and Practice of Bankruptcy"; *E. Manson*, "A Short View of the Law of Bankruptcy"; *R. Ringwood*, "The Principles of Bankruptcy".

Scottish.—Goudy on "Bankruptcy"; *Wallace* on "Bankruptcy"; *Green's* "Encyclopædia of Scots Law".

Irish.—J. H. Robb, "The Law and Practice of Bankruptcy and Arrangements in Ireland".]

CHAPTER XII

MONEYLENDING, MORTGAGES, AND LIEN

Introductory—Moneylending—Mortgages—Pledges—Bills of Sale—Lien—Mortgage in Scots Law—Lien, Pledge, and Hypothec—Addendum

INTRODUCTORY

When a business man finds that he requires more capital, there are many well-known ways in which he can obtain it. He may take a partner (see Chapter III of this Part), he may convert his business into a limited liability company (see Chapter IV of this Part), he may mortgage his land and business premises, or he may obtain an advance from his bank or elsewhere either by depositing securities or upon his personal credit.

These commercial means of borrowing are well recognized and practised every day, not because borrowers are in difficulties, but because they can profitably employ the capital in undertakings within their special business knowledge. It is also necessary to discuss the law of borrowings which are generally of a different character, depending upon needs which are more importunate and not always so justifiable.

This chapter is mainly concerned with the means of raising money by borrowing on personal security, on the transfer of real property or the deposit of title deeds or documents as security, or on advances on goods whether deposited with the lender or retained by the borrower. The position of the professional moneylender, and rights, in the nature of lien, to retain the property of others as a security for their debts, are also discussed.

MONEYLENDING

With ordinary loan transactions between competent adults which do not come under the provisions of the Moneylenders Act, 1900, the Courts will not interfere, but unless actual fraud is alleged, will enforce such contracts without reopening them and enquiring into their fairness. The general law applies equally to loan and other transactions in respect of disability to contract, and as to the effect upon a contract tainted with fraud or undue influence (see Chapter I of this Part). Infants, however, are specially protected in moneylending transactions.

Infants

All contracts entered into by infants for the repayment of money lent or to be lent are absolutely void unless the loan has been advanced to enable the infant to buy necessaries and has been used by the infant for that purpose. The Courts on equitable grounds permit the lender in this case to step into the shoes of the supplier of the necessaries and enforce against the infant a contract for money lent. "Necessaries" are goods suitable to the condition in life of the purchaser and to his actual requirements at the time they are sold and delivered to him.

When an infant has made a clear representation that he is of full age, and has thus deceived some other person and induced him to make payments on his behalf, the infant will be compelled to restore any advantage which he has thus obtained—not, however, to fulfil all the terms of the contract he has made with the lender.

It is a criminal offence knowingly to send an

infant a circular inviting him to borrow money for the interest or profit of the lender. The sender of such circular is deemed to have known that the infant was a minor unless he can prove that he had reasonable ground for believing him to have been of full age. An employer is not responsible for the wrongful act of his servant in sending out such circulars to minors contrary to his express orders. If, for example, a moneylender forbids his clerk to send out circulars to second lieutenants in the army because he knows that some of them are minors, he cannot be prosecuted if his clerk disobeys this instruction.

No action can be brought upon any promise made after full age to pay any debt contracted during infancy, nor upon any ratification on reaching maturity of any promise or contract made during infancy, even if there be some new consideration for such ratification or promise. An infant's promissory note or bill of exchange is, however, valid unless the infant, on reaching full age, disavows his liability.

"Catching Bargains"

These in regard to loan transactions are contracts made with heirs, reversioners, or others who expect to become entitled to property on the death of some third person. The lender advances money and usually takes from the expectant a promissory note, a post-obit bond, or some other form of undertaking to pay a larger sum of money when the third person dies. With such transactions the Courts have always been very zealous to interfere on equitable grounds, to reopen the bargain and to prevent an unscrupulous advantage being taken of an expectant's necessity or inexperience.

A bargain may, however, have been a reasonable one in view of the facts known at the time it was entered into, although a very high rate of interest was paid. In such a case the Courts will not interfere. But if the infant was young or illiterate, unbusinesslike, of weak intellect, or so impoverished as to be forced to accept a bargain which, in view of the facts known at the time of contracting, was unfavourable to his interests, the Courts will infer that weakness on the one side and extortion on the other have prevented true consent. In such a case, especially if the bargain was surreptitious and made without independent advice, the contract will be reopened. What must be shown before relief can be granted is that a one-sided bargain has been made, and that the expectant was not upon an equal footing with the lender at the time of entering into the contract. The Court generally orders the expectant to repay the amount actually advanced, with interest at 4 or 5 per cent.

Moneylenders

In ancient Rome, in many foreign countries at the present time, and in this country until half a century ago, the State has endeavoured to protect the weak-minded and necessitous from extortion, by what are known as "Usury Laws". By these laws a rigid maximum rate of interest is prescribed. Such laws have proved of little use, but the subject is still a favourite one with some moralists who are not economists. Where the maximum rate of interest has been fixed so low as to be insufficient to recompense a lender for advancing his money unless good security was forthcoming, the effect has often been to hinder transactions which would have enabled a trader to escape from a temporary stress of misfortune. Any limitations on the freedom of private borrowing must also play largely into the hands of companies, which are already in a favoured position as borrowers compared with private traders.

Another grave defect in usury laws is the ease with which unscrupulous lenders can follow the letter of the law and thwart its spirit. For example, if a law forbids more than 25 per cent interest to be charged, the lender can advance £1000 at 25 per cent on condition that the borrower spends £750 of it in purchasing worthless goods or shares, or in some other way contributes indirectly to the lender's profit.

The only feasible method, if any, of checking extortion without hindering genuine, if risky, business transactions is by empowering some Court or other authority to reopen loan transactions *ab initio*. This principle is partially adopted in the Moneylenders Act, 1900, itself a much-debated measure, which empowers the Courts to reopen loan transactions with professional moneylenders. Where, however, the lender is not of this class the Courts cannot intervene, however extortionate or unfair the bargain may have been, unless actual fraud has been practised.

The investigation of the Court is not confined to the particular contract on which the action is brought, but is also directed to earlier transactions between the parties which have led to the formation of the bargain impeached.

The expression "moneylender" includes every person whose business is that of moneylending, or who advertises, or announces himself or holds himself out in any way as carrying on that business, except genuine pawnbrokers, friendly societies, societies registered or having rules certified under the Friendly Societies Act, 1896, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874–94, bodies incorporated or empowered

by a special Act of Parliament to lend money in accordance with such special Act, or bodies corporate exempted from registration by order of the Board of Trade, or any person "*bona fide* carrying on the business of banking or insurance, or *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money". The only exception which occasions much difficulty is the last one. In each case the fact to be determined is whether moneylending is the real object and the other business merely a cloak, or whether the lending of money is only incidental to a genuine business. Solicitors are very often obliged to lend money to their clients, but such lending is only incidental to their profession. A tradesman may find it necessary to give some customers long credit, to accept payment for his goods by bills or promissory notes, and to renew or discount such bills—it may even be advisable to advance money to some customers from time to time. If his business is genuine, and the moneylending only incidental, such a tradesman is not a "moneylender", nor is a man who lends money to a few of his friends. But a moneylender cannot evade the Act by limiting his loan transactions to some particular class—such as company promoters—and calling himself a speculator in mining promotions or some other fancy name. For, although a moneylender is usually willing to lend to anyone who appears to be fairly substantial, it is sufficient if a main source of livelihood is obtained from interest or other profits on loans, whether to some particular class or no.

Registration of Moneylenders

A moneylender as defined by the Act must—

(*a*) Register himself as a moneylender under his own or the usual name under which he has hitherto and is then carrying on business, and in no other name, and with the address, or all the addresses, if more than one, at which he carries on his business of moneylender; and

(*b*) Carry on the moneylending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(*c*) Refrain from entering into any agreement in the course of his business as a moneylender with respect to the advance and payment of money, or taking any security for money in the course of his business as a moneylender, otherwise than in his registered name; and

(*d*) On reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

If he neglects to comply with these provisions, a moneylender may be summarily convicted and heavily fined, and for any but a first offence imprisoned. A moneylender may not be registered and carry on business under more than one name. The mere fact that by an error he has been able to register himself under two or more names is no defence. No prosecution for failing to register as a moneylender can, however, be brought without the consent of the Attorney-General or the Solicitor-General in England or Ireland.

Although a moneylending business can only be carried on at a registered address, every stage or incident of every piece of moneylending business need not be transacted at the moneylender's registered office. The term "carrying on business" imports a series or repetition of acts.

Where a contract is entered into in any but the registered name it is void, and the whole bargain is annulled. If the moneylender has obtained securities from the borrower, the borrower probably cannot recover them without repaying the principal advanced. When securities are taken in the name of a moneylending firm which is not, or whose members are not, duly registered, the securities are void and cannot be enforced even by a purchaser for value without notice or knowledge of any defect in the registration.

Registrations are valid for three years; at the end of that time they must be renewed. They must be made on forms prescribed; and in England effected at Somerset House (office of the Controller of Stamps and Stores), in Scotland at the office of the Controller of Stamps and Taxes, Edinburgh, and in Ireland at the office of the Controller of Stamps and Income Tax, Dublin. Separate registration is required if the business is carried on in more than one part of the United Kingdom. The fee is £1.

Reopening Loan Transactions

When the moneylender has duly registered, he is entitled to carry on his trade, but the Courts may interfere with the bargains he has made, reopen them, and readjust the rights of lender and borrower. The Moneylenders Act, 1900, does not in any way limit the former equitable jurisdiction of the Courts to grant relief to borrowers in cases where such relief was formerly given (see "Catching Bargains" above). In addition to leaving this power untouched, the Act provides that loan transactions with a "moneylender" may be reopened by the Court when there is satisfactory evidence that the interest or other charges

in respect of the sum actually lent are "excessive" and that the transaction is in either case "harsh and unconscionable", or (except as regards Scotland) is otherwise such that a Court of Equity would give relief. The meaning of these terms presents considerable difficulty, and has given rise to decisions and dicta hard to reconcile. The meaning of the term "excessive" is supplied by the Act itself, for it provides that the Court may relieve the borrower "from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable", notwithstanding any previous agreement or settlement. The Court may order the return of any excess, and set aside or revise any security or agreement. It is clear that a distinction of great importance is to be drawn between secured loans and unsecured loans. In the first case the risk may be slight, and even 10 per cent interest might be held excessive. With regard to unsecured loans it is clear that no standard rate of interest can be laid down—unless a usury law is practically re-enacted. The Courts will be very slow to hold that interest is excessive if the borrower is a man of experience and business aptitude. The intention of the legislature was to deal with cases of unbusinesslike persons coming to moneylenders in order to escape from urgent and pressing needs, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the moneylender. The fact that an intelligent man thoroughly understood the terms of the bargain he was making, and acquiesced in them, is a circumstance which the Courts will take into account. An experienced borrower is the best judge of his own private affairs and the risk which the lender is taking. Mr. Justice Joyce said in the case of *Part v. Bond* (1905): "If an excessive rate of interest be obtained merely through the folly or weakness of the borrower, or his urgent necessity, real or imaginary, with knowledge on the part of the lender such as he must possess, then in my opinion the transaction is harsh and unconscionable". Very excessive interest and charges may be regarded as *prima facie* evidence that a transaction is harsh and unconscionable. When excessive interest is apparently established in this way, facts showing that the bargain is not harsh and unconscionable must be proved by the lender. The burden is shifted upon his shoulders. It may be broadly taken that if interest is at a greater rate than 100 per cent per annum the lender has to disprove harshness and unconscionability. This does not apply to loans for a very short time—such as fourteen days. In that case £5 for a loan of £25 would not generally be regarded as excessive interest. The risk run by the lender may be almost as great as if the loan were for a year. "Harsh and unconscionable" implies that the borrower was not able to bargain on terms of equality. An instance of this is often afforded in the case of agreements containing a "default clause" which the borrower does not understand, or concealing the rate of interest by using some such phrase as "interest to be at the rate of ½*d.* per £ per day", which looks quite small, but means about 75 per cent. The insertion of such clauses in an agreement throws upon the moneylender the burden of proving that he had clearly explained the effect of the clauses to the borrower or that the bargain was a fair and proper transaction.

It will be seen that the Act provides a law for dealings with moneylenders very similar to the law governing "catching bargains". In each case the borrower must have made a bad bargain and promised to pay excessive interest; in each case the transaction must have been harsh and unconscionable. See further on p. 165.

Ordinary Loans

To lend on personal security means to advance money without taking any land, goods, or document of title to secure repayment, but solely in reliance upon the substance of the borrower and the value of his promise to repay.

In the everyday cases of trifling sums lent by one friend to another, no formalities are used. With regard to larger amounts, and to dealings between mere acquaintances or strangers, the borrower often gives a promissory note, bill of exchange, or I O U. (See Chapter VII of this Part.)

Loans on personal security are sometimes secured by the signature of a third person, who guarantees the repayment, and who may be sued by the lender if the principal debtor cannot pay (see Chapter VIII of this Part). Post-dated cheques are also common forms of borrowing on personal security.

Deposit of Deeds and Documents of Title

When the title to any kind of property has to be established by deeds or documents of title, that property can be charged with the repayment of a debt by depositing such deeds or documents with the creditor. A charge of this nature is generally called an "equitable mortgage by deposit". The title deeds of an ordinary estate,

the land certificate of an estate registered under the Land Transfer Act, 1897, share certificates, share warrants, dock warrants, bills of lading, and insurance policies, among many other documents of title, are commonly charged in this way. If the deposit of documents is accompanied by an express verbal or written contract or memorandum, the terms will determine the nature and extent of the charge, and whether past, present, or future advances are secured. But no writing or other formality is essential in the case of a mortgage by deposit. The mere deposit of the documents as security of itself creates a charge for the debt then owing. It is sufficient to prove that the intention was to create a charge. No mortgage is created by depositing documents of title for safe custody, even if money is owing to the person with whom they are deposited; but the handing over of title deeds to enable a formal legal mortgage to be drawn up is evidence of an intention to create a charge. With regard to title deeds of land it is not necessary that all the deeds should be deposited, or even all the material documents, so long as those deposited are material, and show a title in the depositor. Even an actual deposit is not always necessary. A charge can be created by an order written by the debtor to a third party in possession of the documents of title, to deposit them with, or hold them as security for, the creditor. So, too, a memorandum of agreement showing an intention to deposit title deeds by way of equitable mortgage, or to charge the property comprised in them with the payment of a debt, has been held to suffice. When, however, deeds relating to only a part of an estate are deposited, and a verbal promise is made to deposit the deeds relating to the rest of the estate to secure a debt, only that part of the estate for which the title deeds are actually deposited is charged with the debt.

When an equitable charge has been created the debtor may pay off the sum due without giving the creditor any definite notice, unless an agreement to the contrary effect has been made.

The remedies of the creditor who has such a charge are to foreclose or to apply to the Court for permission to sell the property or for the appointment of a receiver. These remedies are discussed and explained in the following section.

MORTGAGES

Mortgages of Land by Deed

Under this heading are included both legal mortgages and equitable mortgages by deed. A legal mortgage is only possible when the debtor has a legal estate to convey and adopts a form of mortgage recognized by law, as distinct from equity—a distinction with which none but lawyers and legal historians are much concerned. When the debtor has only an equitable interest, as, for example, when he wishes to create a second mortgage, no legal mortgage is possible. In substance and in form alike legal and equitable mortgages by deed are very similar.

In form a legal mortgage is an absolute transfer of the land charged with the debt, generally containing a personal covenant by the debtor to repay the principal moneys and interest, with a proviso for the reconveyance of the land to the debtor if he repays all principal and interest due within some fixed period, usually six months.

The following is an ordinary form of mortgage of freehold land:—

Mortgage of Freehold Land

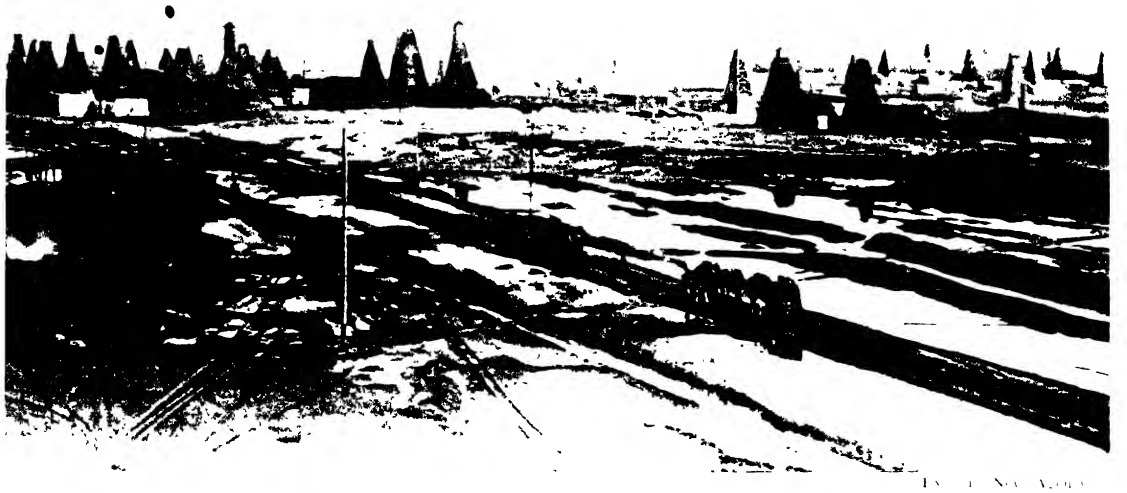
"This Indenture made the ..... day of ....., 19. .. ., between Frank Ethrington Sinclair, of Graseby Hall, Graseby, in the County of Warwick, gentleman (who together with his heirs and assigns is hereinafter called 'the mortgagor') of the one part, and Thomas Jones, of 189 Sudbury Lane, Merton, in the County of Worcester, pork butcher (who together with his executors, administrators, and assigns is hereinafter called 'the mortgagee') of the other part;

"WHEREAS the mortgagor is seised in fee simple free from incumbrances of the lands, tenements, and hereditaments hereinafter conveyed

"AND WHEREAS the mortgagee has agreed to lend to the mortgagor the sum of £15,000 upon having the repayment thereof with interest at 4½ per cent per annum secured in the manner hereinafter mentioned.

"NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £15,000 paid to the mortgagor by the mortgagee (the receipt whereof is hereby acknowledged), the mortgagor hereby covenants with the mortgagee to pay to him on the ..... day of ... ., 19....., (*six months after the date of this deed*) the said sum of £15,000 with interest thereon in the meantime at the rate of 4½ per cent per annum from the date of these presents; AND ALSO so long as any part of the said sum of £15,000 shall remain due and owing, to pay to the mortgagee interest thereon at the said rate by equal quarterly payments on the usual quarter days;

"AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the mortgagor as beneficial owner hereby conveys unto the mortgagee ALL THAT piece or parcel of land known as the Graseby Hall Estate situate in the parish of Graseby in the County of War-



NAPHTHA WORKS AT BALAKHANY, NEAR BAKU

CHAUCHICHACA BRIDGE ON THE TRANSANDINE RAILWAY, PERU

wick together with all messuages and buildings thereon, and which piece or parcel of land is more particularly delineated and coloured pink on the plan hereunto annexed,

"TO HOLD the same unto and to the use of the mortgagee in fee simple

"PROVIDED ALWAYS and it is hereby agreed and declared that if the mortgagor shall on the ..... day of ....., 19....., (*the date in the covenant to repay*) pay to the mortgagee the sum of £15,000 with interest thereon in the meantime at the said rate of 4½ per cent, the mortgagee shall at the request and at the cost of the mortgagor reconvey to the mortgagor the premises hereby conveyed

"AND the mortgagor hereby covenants with the mortgagee that he will at all times, so long as any part of the said principal sum of £15,000 or any interest thereon shall remain due and owing to the mortgagee, insure and keep insured all buildings erected or to be erected upon the piece or parcel of land hereby conveyed against loss or damage by fire with the ... . Insurance Corporation in the sum of £5000 at the least AND will pay all premiums payable in respect of such insurance within seven days after the same shall become due and will on demand produce to the mortgagee his agents or servants the policy of such insurance and the receipt for the last payment of premium payable in respect thereof AND will expend any moneys received under the said insurance policy in repairing or rebuilding any buildings injured or destroyed by fire or in erecting new buildings in accordance with plans to be approved in writing by the mortgagee.

[Here will be inserted other conditions and covenants suitable to the particular case, e.g. a proviso that the mortgagor, fulfilling the other terms and conditions of the contract, may grant mining leases for sixty years.]

"IN WITNESS whereof the parties hereto have hereunto set their hands and seals this ..... day of ....., 19 ... ."

Terms of the Mortgage

Mortgages of leasehold and copyhold premises will be in a very similar form. In each case the title of the mortgagor is recited immediately after the description of the parties in clauses starting with the word "WHEREAS". Then come a recital of the agreement for a loan, the acknowledgment of the receipt of the money, and the covenant to pay interest and to repay capital. This is followed by the nominal transfer of the mortgagor's estate or interest in the land—in the case of freeholds the land is "conveyed" or "granted"; in the case of copyholds the mortgagor covenants to "surrender" the land; in the case of leaseholds to "demise", or in other cases to "assign" it. The rest of the form is almost exactly the same, of whatever nature the property may be, the mortgagor covenanting to do whatever is necessary to maintain the security.

Mortgages of insurance policies and other such documents of title may be created in a similar form, but would usually be created by deposit and memorandum, or simply by deposit—as, for example, with a bank to secure an overdraft or an advance. (See also Part IV, Chapter II.)

Save when special attention is directed to differences between them, the remarks which follow apply equally to both legal and equitable mortgages by deed. One point, however, must be remembered: a legal mortgagee is entitled to, and should insist upon, possession of the title deeds.

In substance a mortgagor remains the owner of the land, and the mortgagee is simply a creditor with a charge upon it. So long as the mortgagee has not given six months' notice to the mortgagor to pay off the principal sum, or the mortgagor has not allowed the interest to fall into arrear, this position is maintained. A mortgagee is, indeed, entitled to enter into possession of the mortgaged land, but if he adopts this course his position is most unenviable. He must account strictly for all receipts, and his every action may be subjected to a critical scrutiny by the Courts. Entry into possession by a mortgagee while interest is not in arrear, and while the principal sum is not yet due, is so hazardous a proceeding that this right may be disregarded. In practice the mortgagor nearly always remains in possession. Despite the form of the deed, the Courts have held that "once a mortgage, always a mortgage" is the most equitable maxim. No conditions will be allowed or enforced which tend to clog the mortgagor's power to redeem. A mortgagee cannot enforce, for example, any stipulation giving him the first option of purchasing the estate if the mortgagor wishes to sell, nor can a brewer enforce a covenant in a mortgage deed compelling a publican, after the mortgage has been paid off, to sell no beer other than the mortgagee's. Under any conditions a sale by a mortgagor to a mortgagee is viewed by the Courts with the gravest suspicion, while no lease by a mortgagor to a mortgagee can be entertained.

Apart from any express stipulations to the contrary in the deed, a mortgagor in possession may receive the rents and profits of the mortgaged estate without accounting for them to the mortgagee in any way, and may bring actions to recover such rents and profits, or for trespass or nuisance in his own name. He may grant building leases for ninety-nine years and ordinary leases for twenty-one years; he may cut timber or use up the resources of the estate so long as he does not thereby endanger the mortgagee's security.

The great difference between the form and the substance of a mortgage by deed is clearly shown upon an intestacy. Although in form the mort-

gagor of a freehold estate has only a right to redeem, upon his death intestate his interest passes to his heirs, they taking the estate subject to the mortgage debt. Upon the death of the mortgagee in whom the legal estate is vested, his interest is treated as personal property and devolves on his personal representatives.

The estate of the mortgagor is entitled his "equity of redemption". This he may sell, dispose of by will, make subject to a second or third mortgage, and generally deal with as he could with an unmortgaged estate. The equity of redemption is lost by the exercise by the mortgagee of his powers of sale or foreclosure (see below), by the fraudulent creation of a second or other subsequent mortgage by the mortgagor, or by the mortgagee entering into possession of the mortgaged estate and remaining in possession for twelve years without acknowledging the mortgagor's title.

Interest

If a mortgagee, in order to ensure prompt payment, provides, for example, that interest is to be paid at the rate of 4½ per cent per annum, but that if any quarterly payment remains unpaid for twenty-one days, then interest is to be paid at the rate of 5 per cent per annum, the Courts will not enforce this provision. The proper way to obtain this result is to stipulate that interest is to be at the rate of 5 per cent, but that if paid within twenty-one days from the time when it becomes due, any quarterly payment need only be made at the rate of 4½ per cent. This method of remission will be enforced by the Courts, which view penalties with disfavour. Compound interest can only be charged when there are express stipulations for it in the mortgage deed.

If the mortgagor fails to pay the interest on the mortgage debt, the mortgagee has three remedies. As already pointed out, he will be ill advised to enter into possession of the land, for, though he can deduct the interest due to him from the rents and profits he collects, his actions will be liable to review by the Courts, he must account not only for moneys received, but also for all moneys which he might by diligence have collected, and at best he will be doing the work of a steward of an estate without receiving any remuneration.

The most simple remedy, if the mortgagor is solvent, is to sue him under the personal covenant to pay interest contained in all well-drawn mortgage deeds. The third method is by appointing a receiver. Unless such a power is expressly excluded by the mortgage deed a receiver can be appointed (1) when interest has been in arrear for two months; (2) when the mortgagor has broken any of the covenants or conditions in the deed other than those for payment, or (3) when notice to pay off the mortgage has been given and for three months the mortgagor has failed so to do. A great advantage in a receivership is that a receiver is not regarded as the mortgagee's agent, but as the agent of the mortgagor. He charges a commission on the moneys he collects. His duties are to collect the rents and profits and to apply them to the upkeep of the estate, his own remuneration, and payment of interest to the mortgagee in that order. The balance, if any, goes to the mortgagor.

Recovery of the Mortgage Debt

A mortgage is generally intended by both parties to be something more than a temporary loan. In accordance with this general intention a mortgagor cannot repay nor can a mortgagee call in his money without giving six months' notice of his intention so to do, or, in the case of the mortgagor, by payment of six months' interest in lieu of notice. If the mortgagor fails after notice to pay, the mortgagee can proceed to recover it by action upon the covenant to repay contained in the deed. Even if there is no such covenant he can bring an action for money lent. These methods are only of use if the mortgagor is solvent apart from the estate. Another remedy, and the oldest one, is to foreclose the mortgage. A date is fixed by the Court upon or before which the mortgagor must pay off his indebtedness. If he fails to do so he ceases to have any claim or interest in the mortgaged land, which becomes the absolute property of the mortgagee. By far the most convenient and common remedy is to sell the estate. A sale may be ordered by the Court in an action for foreclosure, or the right of sale may be given by express terms in the mortgage deed. But unless the deed negatives such a power a mortgagee is entitled to sell the estate when interest has been in arrear for two months, or when the mortgagor has broken a provision in the deed other than the covenant for payment of principal or interest, or when notice to pay off the debt has been given and there has been for three months failure so to do. The sale may be either by public auction or by private treaty. The mortgagee is not bound to study any interest but his own, and need not defer selling until a favourable opportunity. A sale "by order of the mortgagee" is generally at a sacrifice. A mortgagee cannot be called to account unless he has acted dishonestly or with gross negligence. The moneys realized by the sale must be applied in order to the payment off of any prior mortgage charges or other encumbrances, to the payment of the expenses of the sale and the mortgagee's own debt, and to the payment

of other subsequent charges. The balance, if any, belongs to the mortgagor.

The mortgagee's remedies are concurrent, not alternative. In other words, by exercising some one of them he is not debarred from resorting to another. If, for example, he sells the land but the proceeds are not sufficient to reimburse him, he may bring an action to recover the balance on the covenant to repay.

Priority of Mortgages

This question seldom, if ever, arises unless the mortgagor has been dishonest; but, given a dishonest mortgagor and careless mortgagees, complications may ensue. In the ordinary cases where there are two or three mortgagees on the same property the mortgage first created is the first charge on the property; the second mortgagee will be informed of the existence of this charge and will, to his knowledge, only have a second claim on the property, and so on.

But let us suppose that A has in the past taken a lease of certain property and has subsequently acquired the freehold. A is dishonest and wishes to raise money before leaving the country. Purporting to mortgage his leasehold interest, he may deposit the lease with B. He may grant a legal mortgage of his freehold to C. If he can make some plausible excuse for retaining or not producing the title deeds to the freehold, he can raise further sums by a later mortgage to D.

When the Courts have to determine the priority of rival mortgagees they adopt these rules, in the following order:—

1. If a subsequent mortgagee was aware, or by due prudence would have become aware, of a prior charge, his charge is postponed to the charge of which he knew or should have known.
2. If any mortgagee has been negligent and has by his conduct permitted the fraud, he loses the priority he might otherwise have had.
3. If none is specially to blame, the mortgagee in whom is vested the legal estate has priority.
4. If none has the legal estate, priority of time gives priority of right.

If a mortgagee who is entitled to their custody allows a mortgagor to obtain possession of the title deeds he is generally held to have facilitated the fraud. To advance money when the deeds are not forthcoming is negligence unless such non-production is accounted for by a reasonable excuse.

Tacking and Consolidation

Consolidation is now of rare occurrence, and can only take place when power to consolidate is expressly given in a mortgage deed. If A has advanced money on two separate mortgages to B on two separate estates, and if power to consolidate is contained in either deed, A can refuse to allow B to redeem one mortgage without redeeming the other. If one estate has increased and the other decreased in value this power is of great use.

Tacking is a useful right when the legal estate has passed by mortgage. The mortgagee who has the legal estate, and who advances a further sum on the security of the same property, may tack this further advance to the sum due to the original mortgage. If in the meantime a second mortgage has been created of which the first mortgagee had no notice at the time he made the second advance, both his advances take precedence of the second mortgage; but not if he had notice. Second and subsequent mortgagees should always give notice of their mortgages to the first mortgagee if he has the legal estate. Another and similar instance of tacking occurs where a person, ignorant of the existence of a second mortgage, advances money on mortgage of land which is subject to a first legal mortgage. If he subsequently purchases the legal mortgage on learning of the second mortgage he can tack his original advance on to the legal mortgage and take priority over the second mortgagee.

Tacking can never occur unless the legal estate is mortgaged.

Mortgages of Leaseholds

There are two ways in which mortgages of leaseholds can be effected, by assignment and by sub-demise. If the mortgage is by assignment the whole term of the mortgagor's leasehold interest is assigned and the mortgagee is responsible to the lessor for the rent and for the performance of other conditions in the lease. At all events when the conditions are onerous, taking a mortgage by way of assignment is a risky proceeding.

If the mortgage is by sub-demise, the mortgagor demises the premises to the mortgagee for the whole of his term less one or two days. In this way there is no privity of estate between the lessor and the mortgagee, and the mortgagee is not responsible for rent and performance of covenants. In both cases the mortgagor will covenant with the mortgagee to preserve the security by paying the rent and performing all the covenants and conditions of the head lease.

PLEDGES

It now remains to deal with loans on the security of goods. If the goods are deposited with the lender of money they are called pledges. If the goods are retained by the borrower, bills of sale are created in England and Ireland. In Scotland a charge on corporeal moveables can only be made by delivery and giving possession to the creditor. In Ireland bills of sale are regulated by the Acts of 1879 and 1883.

Certain rights to hold the goods of a debtor until a debt is discharged are called liens.

Under the heading of pledges comes one special kind of pledge known as a "pawn". First, however, of pledges other than pawns. If a time for the redemption of a pledge is appointed, neither party can call upon the other to make or receive payment of principal and interest, nor to take back or give up the article pledged, until that time arrives. When the fixed time has elapsed and the borrower has failed to redeem, the lender may sell the pledge, deduct principal, interest, and costs, and return the balance to the borrower. In the case of pledges other than pawns the pledgee cannot himself buy the goods. Until the sale, even if the time agreed upon has passed, the borrower can insist on redeeming his pledge on payment of the whole sum due for debt, interest, and costs. In cases where no time is fixed, the lender must give reasonable notice before selling his pledge. In either case the lender is entitled to use the pledge, if from its nature it will not be the worse for use. But if use damages the pledge it must not be used. Thus, if a ring is pledged the lender may wear it; not, however, if the article pledged is an article of clothing.

A lender may, instead of selling the pledge, bring an action against a borrower who has made default in payment of principal or interest; and an action for the balance due may be brought if on the sale of a pledge the proceeds are insufficient to meet the debt, interests, and costs of the lender.

An action for the money is only brought as a matter of practice when the article pledged has deteriorated in value, has been lost, or has perished through no fault of the holder of the pledge. If, for example, a horse which has been pledged dies from natural causes, the pledge has perished, but the pledgee has a right to recover his debt and interest. If a pledge is damaged, lost, or destroyed through the fault of the pledgee, the pledgor can bring an action to recover the value of the article, less his debt and interest thereon. In the case of pledges, no formality or writing is required; but if there is a written agreement it will require a stamp, and its terms will govern the contract.

Fraudulent pledges by mercantile agents stand in an exceptional position. A pledge of goods or documents of title by a mercantile agent for a present consideration is valid if the lender is ignorant of any defect in the agent's title. Thus a pledge is good although the agent has been forbidden to pledge the goods or documents, or although the agent has retained possession of them after the owner has ordered him to return them to himself or to another agent. (See Chapter VI of this Part.) A pledge to secure an old debt stands in a different position. The lender then only acquires over the pledge the right, if any, which the agent had at the time when he pledged the goods or documents of title.

Pawns

The peculiar position of pawnbrokers and the statutory conditions with which they must comply in carrying on their business have been dealt with in Part I, Chapter XIII. In this section it is only the relations between the pawner and the pawnbroker which are considered. A pawn is an article pledged for a sum not exceeding £10 with a pawnbroker. A pawnbroker is any person who carries on the business of taking goods by way of security for sums lent not exceeding £10. This does not mean that a pawnbroker may not advance more than £10 upon any article pledged with him, but in such a case the ordinary law applies to the pledge and it is not a pawn. Needless to say, an isolated instance of lending some small sum and taking goods as security does not constitute the lender a pawnbroker, nor does a constant practice of lending more than £10 on a deposit of goods in these cases the ordinary law of pledges applies. A pawnbroker need not register himself as a moneylender so long as he confines himself to pawns, nor will a solitary loan for profit of more than £10 be a breach of the Moneylenders Act. A pawnbroker must not take articles in pawn from any person who appears to be intoxicated, nor from anyone apparently under twelve years of age, nor, within the metropolitan police area, from anyone who appears to be under sixteen years old. Some classes of goods must not be taken in pawn at all —the principal of these are military equipments, naval or other public stores, policemen's clothing, goods marked "workhouse", unfinished or partially manufactured textiles, or tools for manufacturing textiles, or linen goods, clothes, or materials known to have been entrusted to the pawner or some other person for washing, mending, or making up. In certain dockyard towns it is illegal knowingly

to take in pawn naval clothes. It is always illegal for a pawnbroker to buy or take in pawn a pawn ticket issued by another pawnbroker.

A pawnbroker, on taking an article in pawn, must give the pawner a pawn ticket, and must not take the article in pawn unless the pawner takes the ticket. A distinction must be drawn between pawns for 10*s.* or less, pawns for 40*s.* or less, and pawns for over 40*s.* The law regulating these different classes may best be seen by noticing the statutory form of a pawn ticket for an article pawned for less than 10*s.* and comparing the differences in the form of tickets for articles on which more than that amount is advanced.

Form of Pawn Ticket

For loan of ten shillings or under

Pawned with [John Smith], Pawnbroker,
[236 High Street, Whitechapel],
this . .. day of ....., 19.....
by [Henry Williams] of [25 King Street, Holborn],
for the sum of [ten] shillings,
[One Black Frock Coat].

The Pawnbroker is entitled to charge:

For this ticket - - - - - one halfpenny.
For profit on each two shillings or part of two shillings lent on this pledge for not more than one calendar month - one halfpenny.

And so on at the same rate per calendar month.

After the first calendar month any time not exceeding fourteen days will be charged as half a month, and any time exceeding fourteen days and not more than one month will be charged as one month.

This pledge must be redeemed within twelve calendar months and seven days from the date of pledging. At the end of that time it becomes the property of the Pawnbroker.

If the pledge is destroyed or damaged by fire the Pawnbroker will be bound to pay the value of the pledge, after deducting the amount of the loan and profit, such value to be the amount of the loan and profit and twenty-five per cent on the amount of the loan.

If this ticket is lost, mislaid, or stolen, the pawner should at once apply to the Pawnbroker for a form of declaration to be made before a magistrate, or the Pawnbroker will be bound to deliver the pledge to any person who produces this ticket to him and claims to redeem the same.

Where the loan is 5*s.*, or under, the pawnbroker may charge ½*d.* for the form of declaration; if the loan is more than 5*s.* he may charge 1*d.*

The form of a pawn ticket for a sum exceeding 10*s.*, but not exceeding 40*s.*, differs from the above form in two respects. A pawnbroker may charge 1*d.* for the pawn ticket, and instead of the provision for redemption the following provisions apply:—

"If this pledge is not redeemed within twelve calendar months and seven days from the day of pledging, it may be sold by auction by the Pawnbroker, but it may be redeemed at any time before the day of sale.

"Within three years after sale the pawner may inspect the account of the sale in the Pawnbroker's books on payment of one penny, and receive any surplus produced by the sale. But deficit on sale of one pledge may be set off by the pawnbroker against surplus on another."

The form of a pawn ticket for a sum above 40*s.* is identical with a ticket for a sum above 10*s.* and not above 40*s.*, save for the charge for interest which may be may be made, and which is—

"For profit on each two shillings and sixpence or part of two shillings and sixpence lent on this pledge for every calendar month or part of a calendar month - - - - - - one halfpenny."

A pawnbroker cannot purchase a pawn directly or indirectly from the pawner, but he is entitled to bid for and purchase such pawn at a sale by auction made in accordance with the provisions of the Pawnbrokers Act, 1872, and on such purchase he is to become the absolute owner of the article. In any event, when a pawn is sold by auction the pawnbroker must enter in a sale book the date and place of sale, the name and place of business of the auctioneer, the number of the pledge in the pledge book, the date of pawning, name of pawner, amount of loan, and amount for which the pledge was sold.

A pawnbroker need not deliver up a pledge unless the pawn ticket for it is delivered to him or a declaration has been made by the pawner before a magistrate that he has lost the pawn ticket. To deliver up the pawn without receiving back the ticket or a form of declaration would be most dangerous, for the holder for the time being of such a ticket is presumed to be the person entitled to redeem the pledge, and in ordinary circumstances the pawnbroker must, therefore, hand it over to anyone presenting the ticket on payment of his proper charges. If anyone without a right so to do is detected endeavouring to redeem a pawn, the pawnbroker should hand him over to the police. So also if the pawnbroker is offered articles by way of pawn which he reasonably suspects of being illegally obtained, and if the pawner refuses to or cannot satisfactorily account for the possession of the goods he offers to pawn, the pawnbroker may seize him and the goods and give him into custody. In such a case a magistrate may grant the pawnbroker a certificate for a reasonable sum to compensate him for his expenses, trouble, or loss of time. If goods which have been stolen or fraudulently obtained are pawned, then, on conviction of the criminal, and on proof of the owership of the goods, the Court

may order the pawnbroker to deliver them up to the owner either on payment to him, by the owner, of the loan or a part of the loan, or without any payment at all.

If a pawn is lost, destroyed, or damaged through the default, neglect, or misbehaviour of a pawnbroker, the pawner can recover damages for any injury thereby caused to him, either by action in a County Court or at Petty Sessions.

Subject to some formal variations, the same law applies to Scotland; in Ireland pawnbroking is regulated by special Acts.

Special Pawning Contracts

Notwithstanding anything in the Pawnbrokers Act which is in apparent contradiction, a pawnbroker may make a special contract with a pawner in respect of a pledge on which the pawnbroker makes an advance of more than 40s., provided always that—

1. The pawnbroker at the time of the pawning must deliver to the pawner a special contract pawn ticket signed by the pawnbroker.

2. A duplicate of the special contract pawn ticket must be signed by the pawner and kept by the pawnbroker.

The ordinary provisions applicable to pawns apply to these special bargains, save in so far as their application is excluded by the express terms of the special contract.

The special contract pawn ticket must be in the form provided for such special contracts in the third schedule to the Pawnbrokers Act, 1872.

BILLS OF SALE

Bill of sale is an expression including various documents which evidence the transfer of goods and chattels. The term is most usually applied to a document conditionally transferring goods as security for an existing debt or for the repayment of money lent. It also includes absolute bills of sale which are briefly dealt with in the following paragraph, and also the document which transfers any share in a British ship (see Part VI).

Save in the following subheading, the term is restricted to its most usual meaning.

Absolute Bills of Sale

Absolute bills of sale are documents transferring the whole property in goods to the grantee, the goods themselves remaining in the possession of the grantor; for example, declarations of trust and post-nuptial settlements. Documents of title to goods used in the general course of business, such as dock warrants and bills of lading, are not included under this term, nor are ante-nuptial settlements and assignments for the benefit of creditors.

An absolute bill of sale need be in no particular form, but it will be valid only as between grantor and grantee unless it complies with three requirements; if it does comply with them, the bill is valid against everyone. These requirements are—

1. Registration and filing in the central office in the same fashion and with the same formalities as ordinary bills of sale which must be renewed every five years

2. The consideration must be properly set out in the bill.

3. The grantor must execute the bill, and his execution must be attested by a solicitor, who must have explained to the grantor the nature and effect of the document he is signing.

Validity of Ordinary Bills of Sale

To determine whether any given document is a bill of sale, the sole test to be applied is whether the intention of the lender was to get security for a loan by a charge on goods. If so, whatsoever it may purport to be, the document is a bill of sale. To be a valid bill it must comply with the following requirements:—

1. The amount of the loan secured must not be less than £30. The consideration for which the bill was given must be truly stated. If the consideration is falsely or inadequately stated, the goods comprised in the bill of sale are not charged, but the covenant to repay may be enforced. The bill of sale must be certain in time; it is not possible to make the loan repayable on demand or three months after demand. Nor must the grantor's liability be merely contingent. A bill of sale given as an indemnity to a surety is for this reason void.

2. The bill must be in accordance with a prescribed form (see below).

3. The bill must have a schedule written on it, or annexed to it, containing an inventory of the goods it comprises.

4. The bill must be executed by the grantor and his execution must be attested by an independent credible witness.

5. The bill must be duly registered, or else the goods are not charged, although the covenant to repay may be enforced.

The Form of the Bill

All bills of sale must be in accordance with the form contained in the schedule of the Bills of Sale Act, 1882: the only portions of the following precedent which may be varied with safety are printed in italics.

This Indenture made the ..... day of ....., *19...*, between *Frank Sinclair* of *958 Eardley Road, Birmingham, gentleman*, of the one part, and *Joshua Field* of *891 Upton Street, Birmingham, silk merchant*, of the other part, witnesseth that in consideration of the sum of *£50* now paid to *Frank Sinclair* by *Joshua Field*, the receipt of which the said *Frank Sinclair* hereby acknowledges *(or whatever else the consideration may be)*, he the said *Frank Sinclair* doth hereby assign unto *Joshua Field*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of *£50* and interest thereon at the rate of . per cent per annum *(whatever may be the rate)*. And the said *Frank Sinclair* doth further agree and declare that he will duly pay to the said *Joshua Field* the principal sum aforesaid, together with the interest then due, by equal *quarterly* payments of *£12. 10s.* on the usual quarter days *(or whatever else may be the stipulated times of payment)*.

And the said *Frank Sinclair* doth also agree with the said *Joshua Field* that he will *throughout the continuance of this security keep the said several chattels and things insured against loss or damage by fire with the .. .. Insurance Corporation in the sum of £60 at least. And will punctually pay all rent which shall become payable by him for the premises on which the said several chattels and things are kept. (Other covenants for the maintenance or defeasance of the security are permissible.)*

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *Joshua Field* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed and sealed by the said *Frank Sinclair* in the presence of me, *Henry Matfield of 17 St. John's Road, Handsworth, in the County of Worcester, clerk.*

THE SCHEDULE

The goods and chattels as under now being at 958 Eardley Road, Birmingham:—

1 black mare and foal.

Dining-room suite, 2 armchairs, sofa and 8 small chairs in walnut, mahogany table and sideboard.

Drawing-room suite in walnut (upholstered in blue), sofa, 4 armchairs, 6 small chairs.

Inlaid ivory table (top cracked) and cedar-wood writing desk.

4 mahogany wardrobes (one damaged).

1 Bechstein piano.

1 Chesterfield couch (in study).

The statement of the consideration for the bill must be an accurate description of the benefit of the grantor from the bargain.

A bill of sale which is not in accordance with the above form is wholly void. A mere verbal divergence which does not in any way alter any of the legal consequences of the words used in this form would not invalidate the bill. It is, however, very risky to make any alteration, as the Courts are strict in interpreting this rule. If the bill of sale is even slightly at variance, it does not charge the goods purported to be assigned, nor can any action be brought on the personal covenant to repay, the whole instrument being void. The schedule must contain a sufficient description of the goods to identify them clearly. One item in the above schedule—"one black mare and foal", for example—would under ordinary circumstances be sufficiently described; for usually a man would possess only one black mare. If, however, this bill had been given by a horse-dealer who had more than one black mare with a foal, it would be otherwise, and no charge upon any of his black mares with foals would be created. The schedule must include all the articles sought to be charged; if there is no schedule, the bill of sale is void. The schedule must not include after-acquired property save in the case of "(1) any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed; (2) any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale".

To this rule there is one apparent exception. In a note to the form of a bill of sale it is stated that other covenants for the maintenance of the bill are permissible. It has been held that the form is not vitiated, nor the rule against assigning after-acquired property infringed, if the grantor assigns "also all chattels and things which might at any time during the continuance of this security be substituted for the chattels and things specifically described in the schedule", and covenants are permissible to replace such of the chattels and things assigned as become worn out, by other articles of equal value, so as at all times to maintain the total value of the security.

Registration

Bills of sale must be registered within seven clear days of their execution. To avoid registration it

was once a common practice to create fresh bills every seven days. This is now forbidden, and no fresh bill charging the same goods can be created between the same parties save to correct a genuine error in the earlier bill. The bill must be registered in the Bills of Sale Department of the Central Office at the Royal Courts of Justice, London. A copy of the bill with the schedule annexed is made, and this, together with the original and an affidavit showing the date on which the bill was executed, and speaking to its proper execution and attestation, and a description of the residence and occupation of the grantor and every attesting witness, must be taken to the registrar, whose duties are performed by any of the masters of the Supreme Court. The registrar files the copy and the affidavit and enters them in a register of bills of sale, which may be inspected by anyone on payment of a small fee. Extracts may be taken and copies obtained.

If it appears upon the affidavit accompanying the bill that either the address of the grantor or the goods charged are outside the London Bankruptcy district, the registrar must, within three clear days after registration, transmit an abstract of the contents of the bill to the County Court registrar in whose district such places are situated. The County Court registrar files these abstracts, and any person may, upon payment of a small fee, inspect, make extracts from, or get copies of such abstracts. Registration holds good for five years, and must be renewed at the end of that period. The effect of non-registration or of a faulty registration is to make void any charge on the goods, but an action can be maintained on the personal covenant to pay principal and interest.

A bill of sale, like a mortgage by deed of land, appears to give to the grantee an absolute transfer of the mortgaged property, but, in fact, the grantor remains the owner so long as he performs his part of the contract. Personal chattels assigned under a bill of sale are not liable to be seized or taken possession of by the grantee for any other than the following causes:—

1. If the grantor makes default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security. (For example, a breach of the covenant to insure the goods, or to replace worn-out articles so as to maintain the total value of the security).

2. If the grantor becomes bankrupt or suffers the goods or any of them to be distrained for rent, rates, or taxes.

3. If the grantor fraudulently either removes or suffers the goods or any of them to be removed from the premises.

4. If the grantor does not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes.

5. If execution has been levied against the goods of the grantor under any judgment at law.

When any of these causes has entitled the grantee to seize the goods he must not remove them for five clear days, and must relinquish them if the cause of seizure is done away with within that time—if, for example, the instalment and the expenses of seizure are paid, or if the expenses of seizure are paid and the receipt for rent is produced. The grantor may apply to the Court within the five days to restrain the sale. When five clear days have passed, the grantee may remove and sell the goods, satisfy his claim from the proceeds, and hand over the balance to the grantor. If the grantor assents, the goods may be removed before five days have elapsed. This is of importance, for so long as the goods are on the grantor's premises the fact that they are subject to a bill of sale will not protect them from distress for rent, rates, or taxes. Even if the grantee removes his goods before the five days have elapsed, so as to prevent them from being distrained upon, the person distraining cannot follow up the goods and seize them. Until the goods are removed the landlord's distress for rent or a distress for rates or taxes takes precedence of the right of the grantee to seize. When the goods are seized and removed by the grantee his claim cannot be defeated. The five days' grace is given by law in the interests of the grantor, not of anyone distraining. If, in a distress, goods are taken, some of which are, and some of which are not, subject to a bill of sale, the grantee is entitled to "marshal the assets", that is to say, if more goods have been distrained than suffice to satisfy the distress, he can claim that the goods not subject to his charge are to be held to be the primary source from which the distress must be satisfied.

When the principal sum, interest, and costs, if any, have been paid in full, the grantee signs a document showing that his claim has been satisfied. This document and an affidavit verifying such satisfaction are produced before the registrar. If everything is in order the registrar directs an entry of satisfaction to be made, and the consent and affidavit are filed in the Central Office. If abstracts of the bill have been filed in local county courts the registrar must send to the registrars of such courts notice of satisfaction of the bill.

LIEN

Lien is a right to retain property or goods, or documents of title, apart from any mortgage or pledge, until debts or charges, costs or expenses incurred have been paid. The term "equitable lien" is also applied to the charge of a vendor of land upon the land for any portion of the purchase money not yet paid, or the charge of the purchaser for his deposit or return of purchase money in the event of the sale being abortive. It also includes a trustee's charge upon the trust property for his expenses. But here we speak of commercial liens; which are particular and general.

A particular or specific lien is a right to retain the particular property in respect of which the debt is due. A general lien is a right to retain property as security for the general balance due on the transactions between the parties. Particular liens attach as a matter of law in the case of goods carried; goods stored or warehoused; or goods upon which repairs have been done. A seller has a lien on goods sold in his possession until payment of the price. (See also Chapter VI of this Part, and "Maritime Lien", Part VI.)

The law favours particular liens, and, broadly speaking, all who have repaired, preserved, made up or expended labour upon goods may retain those goods until they are reimbursed. Thus a carrier can refuse to hand over parcels in his possession until his charges are paid. A seller of goods can refuse to part with them unless payment or security is forthcoming. A lien cannot, of course, attach to goods if an agreement, express or implied, to the contrary has been made—as, for example, if the goods have been sold on credit. Accepting security, tender of the debt, or delivery of the goods to the debtor terminates a lien. (See also Chapter VI of this Part.)

General liens are created by agreement or by a customary course of dealing between the parties. The usage must be certain, reasonable, not inconsistent with the law generally and locally established, and universally acquiesced in amongst the traders affected. The lien of solicitors, bankers, innkeepers, factors, warehousemen, wharfingers, stockbrokers, and dyers are generally established. A similar right is claimed, but not yet established, by printers and other classes of traders. A lien created by express contract will be of such a nature and extent as the terms of the contract determine. Other general liens will only be inferred where strictly proved and where the custom is a reasonable one. The extent of the lien will in such a case depend upon the custom.

Solicitors

Solicitors have, generally, a particular lien upon a judgment debt recovered through their instrumentality for their costs in that particular action, and in cases where property other than money is recovered by them in a legal action, the Court before which the proceedings were heard may grant the solicitor a charging order for his costs upon the property recovered. In addition to these rights a solicitor has a general lien upon a client's title deeds, documents, and papers (other than an original will or Court records) in his hands for his general costs.

The general lien of a solicitor is merely a right to keep back from his client the deeds and papers which he holds as solicitor until his bill of costs is satisfied. It is a right derived entirely through his client, and cannot go beyond the right of the client himself. If the client's right to the deeds which came into the solicitor's hands is absolute, so will be the right of the solicitor. If the deeds when in the hands of the client are subject to any rights outstanding in third parties, such rights will follow the deeds into the hands of the solicitor. Papers to which a lien can attach must have come to the solicitor in his capacity of solicitor, and if deposited with him as security for some particular portion of the costs only, cannot be retained for other costs. The right of lien extends to costs and expenses due to a solicitor in his professional capacity and cannot be exercised to secure payment of personal advances. On the bankruptcy of a client the solicitor's lien continues to attach to papers in his hands before the bankruptcy, but not to those he receives after the bankruptcy. (See also Chapter XXVI of this Part.)

Innkeepers

Innkeepers are responsible, apart from certain statutory limitations, for goods deposited at the inn by guests, and are bound to afford such accommodation as they possess to all travellers and to their goods if the traveller can pay the customary charges.

Under these circumstances it is not strange to find that innkeepers possess a general lien on any goods received with the guest until he has paid his bill. This lien is not confined to the guest's own property, but extends to all the goods he brings with him. For example, the samples of a commercial traveller may be retained as security for the payment of his account. If a guest becomes

indebted to an innkeeper for board or lodging, or for the keep of his horses or other animals, and leaves any goods behind him for six weeks without paying the debt, then, in addition to his power of retaining the goods, an innkeeper, as an exceptional statutory privilege, may sell them by auction. He must, a month previously, advertise his intention to sell the goods, describing them and giving the name of the guest, in a London and in a local newspaper. (See also Chapter XVIII of this Part.)

Bankers and Others

Bankers have a general lien for a customer's debt on all his moneys and securities in their hands. (See Part IV.)

Factors, wharfingers, and the other tradesmen possessed of a lien have a right to retain the goods of their debtors until their debts are liquidated. (See Part V.) In any case no lien can attach to property coming into the creditor's hands under an agreement or understanding which impliedly precludes the right. For example, the lien of a banker would not attach to securities deposited with him for safe keeping. But in some few instances goods or securities originally not subject to lien may become so—for example, if a customer deposits securities with a banker for the purpose of securing some particular advance, and then, after the advance is repaid, allows the bank to retain the securities for some time, they will become subject to the banker's general lien.

Lien is a right of retention, not of sale, except, as we have seen, in the case of innkeepers.

MORTGAGE IN SCOTS LAW

The law of Mortgage and of the pledge of title deeds in security of loans in Scotland differs very materially from that of England. In the first place, there is in Scotland no such thing as "an equitable mortgage by deposit" of title deeds or documents. By the law of Scotland only such moveables as are by their nature intrinsically valuable or substantially serviceable, and which therefore would fetch a price in open market, can be made the subjects of pledge. Title deeds and documents have no intrinsic value and therefore cannot be impignorated so as to confer a title of possession to the estate or debt represented by them, capable of competing with the right to vindicate possession competent to the proprietor or creditor who has acquired his right by purchase or other onerous consideration from the pledger. Title deeds cannot, therefore, be retained in security of a loan. The custodian or depository of such deeds or documents may, however, possess a right of lien or retention over the documents deposited with him, which must not be confounded with pledge.

Mortgage

though colloquially known, and more or less perfectly understood, is not, in the Law of Scotland, a recognized legal term. There are in Scotland three recognized modes of constituting a valid security over heritable (or real) property for sums advanced or intended to be advanced to the owner thereof. These are (1) the Bond and Disposition in Security, (2) the Bond of Credit and Disposition in Security, and (3) the Disposition *ex facie* absolute, qualified by a back-bond or back-letter.

The Bond and Disposition in Security

This deed is in the form of a personal bond, to which is joined, for the creditor's further security, a conveyance in his favour of heritable property belonging either to the debtor himself or to someone who is willing that his estate should be conveyed in security of the debtor's obligations. This is the usual and customary method of taking a security over heritage when the loan intended to be secured is advanced instantly and in one sum. The Bond and Disposition in Security may, however, be made available for securing advances due, or to become due, on current account with a banker. But as by an Act of the Scots Parliament (1696, c. 5) it was provided that dispositions and other rights granted for the relief or security of debts to be contracted in the future should not be available as a security for debts contracted subsequent to the infeftment following on such disposition or right, and as at common law no security can be effectually or validly constituted over lands or other heritable subjects for debts or burdens of an indefinite or fluctuating amount, a difficulty was created in making this mode of taking a security over heritage available with reference to advances on current accounts. The difficulty thus created is, in practice, overcome by the bank opening an account in the debtor's name with reference to the loan, to the credit of which is placed the amount contained in the bond. A cheque is then drawn upon the account, withdrawing the whole sum, which is then placed to the credit of an ordinary current account, upon which operations proceed as usual. A statutory form of the Bond and Disposition in security is

provided by the Titles to Land Consolidation (Scotland) Act of 1868. Bonds are registered in the appropriate Register of Sasines, and in competition are preferred according to the date of their registration, since until registration the creditor has no real right over the land. Certain rights are preferable to those of the creditor in the bond, such as local rates, the superior's feu duty, &c., which need not be further specified here. If the debtor fail to pay the sum or sums in security of which the Bond was granted, the creditor may proceed against him both under the personal obligation and the power of sale contained in the Bond.

Realization of Subjects

The Statute already referred to provides for the manner in which the security is to be realized, and its provisions must be strictly adhered to. A notarial intimation is served on the debtor requiring him to make payment within three months, with certification that, in the event of his failure to do so, he will incur the penalty stipulated in the Bond, that the power of redemption will thenceforth cease and determine, and that the creditor, after the expiration of the period of notice, may sell the lands by public auction at such price as they may realize. If the debtor has ceased to be owner of the estate, the intimation of the intended sale must be made to the present owner. After the expiry of the three months, intimation of the intended sale is made by advertisement in various newspapers. The sale then takes place in Edinburgh or Glasgow, or other appropriate town or burgh. If the property finds a purchaser, the creditor executes a disposition in his favour in the usual form. On receiving the purchase price the creditor must account to the debtor, and consign the surplus, if any, in bank. On consignation of the surplus, the disposition by the creditor to the purchaser has the effect of completely disencumbering the lands not only of the security and diligence of the creditor himself, but of all securities and diligences posterior to that security. If there be no surplus, the lands are disencumbered by registration of a certificate by a notary along with the disposition by the creditor to the purchaser. The creditor cannot, except in the case after-mentioned, bid at the sale, and in selling he must proceed with a due regard to the interests of the postponed creditors.

Security Holder becoming Absolute Proprietor

If the creditor has failed to find a purchaser of the lands at the price at which they are exposed, not being greater than the amount of the security, he may apply to the Sheriff (or County Court Judge) of the county in which the lands are situated, for a judgment that the debtor in the bond has forfeited his right of redemption, and that the creditor has become vested in the lands as absolute proprietor, subject to the burdens and conditions contained in the Bond. On obtaining judgment, and having it recorded in the appropriate Register, the debtor's right of redemption is extinguished, and the creditor becomes absolute proprietor of the subjects as though the disposition in his favour, instead of being merely in security, had been an absolute disposition. The Sheriff may, however, require the creditor to re-expose the subjects for sale by auction, in which event the creditor has a right to bid for and purchase them; in which event judgment may be given in his favour as before. Notwithstanding these provisions, however, the personal obligation of the debtor remains in full force and effect so far as not extinguished by the price at which the lands have been acquired. Instead of selling, the creditor may enter into possession of the subjects under what is known as a decree of "maills and duties", which entitles him to collect the rents and sequestrate the tenant's effects; or by what is known as a "poinding of the ground" he may attach the moveable effects on the ground belonging to the proprietor, and also those of the tenants to the extent of the rents due by them. The Act further contains provisions enabling the creditor desirous of entering into possession to eject the proprietor as if he were an occupant without any title, and to let the lands disponed in security upon lease for a period not exceeding seven years. The creditor may, however, apply to the Sheriff for leave to lease the subjects for a period exceeding seven years (but not exceeding twenty-one for heritable subjects and thirty-one for minerals), and if satisfied that a lease for such longer period is expedient for the beneficial occupation of the lands, the Sheriff may approve of the proposed lease on such terms and conditions as appear to him to be expedient.

Bond of Credit and Disposition in Security

Bank credits are peculiar to Scots banking, by means of which, on proper security being given to the bank, persons are enabled to draw to a certain amount agreed upon. To remedy the inconvenience occasioned by the fact that a heritable bond could not be made available as a security for any sum of money advanced upon it, subsequent to the date of the recording of the

bond, it was provided by the Debts Securities (Scotland) Act of 1856 that heritable securities may be given for cash accounts, or for the relief of securities in such accounts, on condition that the principal sum and interest to become due under the bond is limited to a certain definite sum to be specified in the security, not exceeding the amount of the principal and three years' interest at 5 per cent. The deed is in the form of an ordinary bond of credit, with the addition of a disposition of certain specified heritable subjects in security. The security may be conveyed by persons other than the person to receive the benefit of the credit, in which case such persons are entitled to the rights and equities of cautioners. (See Chapter VIII of this Part.) The creditor's right is completed by the bond being recorded in the appropriate Register of Sasines. While in terms of the Act the subjects conveyed in security can be made available only for repayment of the specified amount and three years' interest at 5 per cent, the personal obligation contained in the bond may be enforced for the repayment of whatever sum may be due. The security subsists to the extent of the sum specified, or any less sum, until the cash account is finally closed and the balance paid up and discharged. The security subjects may be realized in the same manner as those conveyed in a Bond and Disposition in Security, and if they are realized, any surplus there may be cannot, in a question with other creditors of the borrower, be applied by the bank in reduction of any other debt due to it. The accumulation of interest at each annual balance converts the interest so accumulated into an advance from the bank.

Disposition *ex facie* Absolute

This mode of constituting a security over heritable subjects is more elastic than either of the modes already considered. By its means lenders (and more particularly banks) are enabled with safety not only to make advances to borrowers on the security of their heritable property, but to continue making advances after the amount originally borrowed has been exhausted, so long as a safe margin of security is left for their reimbursement. The disposition by the debtor in favour of his creditor is in absolute terms, but is qualified by what is known as a back-bond or back-letter from the latter to the former, wherein the conditions entitling the debtor to a reconveyance of his property, and the real nature of the transaction, are fully set forth. In practice, the separate obligation occasionally takes the form of an explanatory letter from the debtor to the creditor, with an acceptance by the creditor endorsed on it, a copy of which is handed to the debtor. In the two former modes of constituting securities over heritable property, the creditor is a mere encumbrancer, whose right is extinguished by a discharge; whereas in the present mode the creditor acquires a real right of property which can be extinguished only by a reconveyance of the subjects over which the security extends. Besides, the back-bond or back-letter may competently provide that the debtor shall be entitled to demand a reconveyance of his property on condition that he pays, not merely the sum which is the specific reason for the granting of the disposition, but everything which he may happen to owe the creditor at the date of the demand for repayment. The right conveyed is an absolute right of property, and imposes on the creditor the liabilities of a proprietor. As a consequence, the creditor is entitled to sell the subjects, to collect the rents, to grant leases, to remove tenants, and even to remove the debtor himself, from possession. Where a sale is resorted to, the creditor must have a due regard to the interests of the debtor. The disposition is, while the back-bond should not be, recorded in the appropriate Register of Sasines, since the effect of recording the back-bond is to render the security unavailable for any sum advanced subsequent to the date of the recording. Upon payment of his whole indebtedness, including any sum expended by the creditor while in possession of the property, to the extent to which the debtor as the real owner of the property is thereby benefited, but not till then, the debtor may compel the creditor to grant a reconveyance of his property. In the disposition it is usual to include not only the ground and the buildings thereon, but also the whole machinery and plant of every description, both heritable and moveable (i.e. real and personal) in or about the premises. While this is so, the conveyance does not cover the moveable machinery upon the ground, unless the creditor, by himself or someone on his behalf, actually enters into possession. Difficult questions not infrequently arise as to what machinery and plant are heritable and what moveable, and the determination of such questions (which are too technical for inclusion in this article) largely depends upon the circumstances of each particular case. It must, however, be noted that a disposition which bears to be granted expressly in security, can never become, either by prescription or otherwise, a disposition in absolute property. Hence, although the debtor becomes bankrupt, and, in accordance with the rules of bankruptcy, the creditor deducts

from his claim the value of the subjects disponed to him in security, and ranks upon his debtor's estate for the balance due, the creditor does not become the absolute proprietor of the subjects (even if the trustee in bankruptcy refuses to take them over as part of the bankrupt estate), so as to enable him to obtain any benefit other than payment of his debt with interest. If the creditor, in such circumstances, desires to retain the property, his proper course is to get the trustee to execute in his favour a renunciation of any reversionary or other right which he may have in the property.

Leasehold Subjects

By the common law of Scotland, an assignation of a lease by way of security, not followed by possession on the part of the assignee, is invalid as against the creditors of the debtor. An important modification of this rule was introduced by the Registration of Leases (Scotland) Act of 1857 in regard to leases of thirty-one years and upwards. When such a lease has been recorded, the debtor may assign his right in whole or in part by formal assignation, which, when recorded, vests the assignee in the grantor's right to the lease, and constitutes a real security over the subjects in favour of the creditor. The creditor in such a lease is entitled, without prejudice, to the exercise of any right of sale therein contained, on default in payment of the capital sum for which the assignation in security has been granted, or of a term's interest, for six months after it has fallen due, to apply to the Sheriff (or County Court Judge) for a warrant to enter into possession of the subjects. The granting of the warrant is a sufficient title to the creditor to enter into possession, to uplift the rents, and to sublet the subjects.

Securities over Moveable (or Personal) Property

According to the law of Scotland, personal property is divided into two classes, corporeal moveables, or those in which the property may be transferred by actual delivery from hand to hand, and incorporeal moveables, or those which, from their nature, are incapable of being so transferred, and which require writing in some form for their transference. Furniture, stock in trade, &c., may be instanced as examples of the former class; while policies of insurance, stock or share certificates, debentures, &c., are examples of the latter class.

Corporeal Moveables

By the law of Scotland no security can be obtained over such property, unless the creditor, or someone on his behalf, obtains actual possession of the subjects. There is thus, in respect of such property, a marked and far-reaching distinction between the law of England and that of Scotland. In Scotland there is no process by which the furniture in a man's house, or the stock in his warehouse, can be effectually assigned by him in security so long as he remains in possession thereof. Nor does a mere colourable contract of sale make any difference, as, for example, where the pretended sale does not take immediate effect, so as to give the alleged purchaser the full and complete right which a true contract of sale confers. Where, however, it can be shown that a *bonâ-fide* out-and-out sale has taken place, the purchaser is entitled to assert his right to the goods, even although they remain in the seller's possession. There is, therefore, it need hardly be added, no such thing in Scotland as a bill of sale, or even anything analogous to it. When the property, instead of being in the debtor's own possession, is stored in neutral custody, as in a warehouse or dock, a transfer of the property may be effected by means of what is known as a delivery order. When such an order in absolute terms is presented to a warehouse keeper, and given effect to by him in the warehouse books, a complete transfer of the goods from their previous owner to the possessor of the delivery order takes place, and such possessor is put in possession of the goods to the same effect as though he had bought them and obtained actual delivery on a contract of sale. But it is of importance to remember that the storekeeper must not be identified with the owner of the goods, in order that constructive delivery may take place by means of a delivery order. Thus, if a merchant has goods in a store exclusively occupied by him, or one into which he receives the goods of others as well as his own, a delivery order granted by him or the storekeeper is not effectual as an instrument pledging the property, even if the storekeeper accepts liability for the goods of the transferee. Over and above mere possession of the delivery order, there must be, to effect constructive delivery, intimation of the transfer made to the storekeeper, and the date of the intimation, not that of the delivery order, fixes the time when the transfer of ownership takes place. Again, where a factor or agent is accredited with the ostensible ownership of goods, not merely by being entrusted with their bare custody, but by having documents put into his hands which on their face confer upon him the

character of owner, such as to enable him to deceive those with whom he transacts, he may effectually pledge the property of his principals by the transference of such documents to a person making *bona-fide* advances on the goods, such person being entitled to rely on the probative title with which the factor has been clothed, and not being bound to make restitution without repayment of his advances.

Incorporeal Moveables

A simple and effectual mode of assigning a person's right in a personal bond or conveyance of moveable estate was introduced into Scotland by the Transmission of Moveable Property (Scotland) Act of 1862. The Act provided that such a transfer might be effected either by a separate writing or by an assignation written upon the bond or conveyance itself. The words "bond" and "conveyance" extend to and include personal bonds for payment or performance, bonds of caution, guarantee, and relief, bonds and assignations in security of every kind, decrees of any Court, policies of assurance of any assurance company or association in Scotland, whether held by persons resident in Scotland or elsewhere, protests of bills and promissory notes, dispositions, assignations, and other conveyances of moveable or personal property or effects, translations and retrocessions, and also probative extracts of all such deeds from the books of any competent Court. "Moveable estate" extends to and includes all personal debts and obligations, and moveable or personal property or effects of every kind and description. Upon the assignation being duly stamped and intimated, the assignee is placed in the right of the cedent, but until intimation takes place there is no completed transference to the assignee. So essential, indeed, is intimation that where two or more assignations have been completed to the same property, that which is first intimated will be preferred to one which is prior in date but posterior in intimation. The intimation may be made by a notary delivering a copy to the person to whom intimation may in any case be requisite, or by the holder, or any person authorized by him, transmitting a copy, certified as correct, by post to such person. In practice the principal assignation is usually sent along with a copy to the person entitled to receive the intimation, who then writes on the principal deed (which he returns) an acknowledgment of receipt of a copy of the assignation.

LIEN, PLEDGE, AND HYPOTHEC

While the general law relating to lien and pledge does not differ in Scotland from that of England, a word may not be amiss with reference to the law of hypothec. Hypothec differs from pledge and lien in that it is a security established by law in favour of a creditor over a subject belonging to his debtor, while the subject actually remains in the debtor's possession. Having regard to the inexpediency of such a right in a country intimately associated with commerce and trading, Scots law admits of but few hypothecs, while those that still exist have been seriously curtailed by legislation. Four kinds of hypothec are known to Scots law: those for rents and feu duties, the maritime and the solicitor's hypothec. Of these the most important is the landlord's hypothec. In virtue of his right of hypothec the landlord possesses a security over the tenant's crops of each year for the rent of that year, and over the cattle and stocking on the farm for the current year's rent. The landlord's hypothec was, however, by the Hypothec Abolition Act of 1880, abolished for all holdings exceeding two acres in extent let for agriculture or pasture. The landlord's right in urban subjects was not, however, affected by the Act. It extends over the household furniture, plate, paintings, books, &c., of the tenant of an urban dwelling, and over the goods in shops, and the instruments of manufacture necessary for the different branches of business carried on in mills, warehouses, &c. Hired furniture is also subject to the right, and the fact that furniture is lent gratuitously does not operate to defeat the landlord's right, though it has been held not to extend to articles sent to a commission agent for exhibition as samples. The hypothec must be made effectual by a sequestration of the tenant's effects carried out within three months of the term. Until sequestration actually takes place the goods in a person's shop are freely vendible, and therefore, till then, all purchases may be safely paid for by a purchaser without risk of a claim for restitution, or of the purchaser's being made liable to pay the price a second time. A superior has also a hypothec for the security and payment of the last or current feu duty over the crops and *invecta et illata* of the tenant, similar but preferable to the hypothec of the landlord. Seamen have a hypothec in security of their wages over the freight due to the owners of the ship, and also a hypothec (which is more properly a lien) over the ship itself in virtue

of which, if the owners earn no freight, they may preserve their claim against the ship itself. Solicitors also possess a right of hypothec (which also is more properly termed a right of lien) in virtue of which they are entitled to retain their client's title deeds in security of their professional accounts. A solicitor also enjoys a right which is more nearly one of hypothec (since it does not depend on the possession of any documents) for the costs of a suit over the costs recovered by his client from the opposite party. This preference does not, however, extend over the principal debt for which judgment may be given in favour of his client, as to which a solicitor is in no better position than any ordinary creditor. But when expenses have been found due, or when they must necessarily follow upon the judgment, the client cannot defeat his solicitor's preferable claim for expenses by any extra-judicial arrangement.

[AUTHORITIES. — *Matthews & Spear*, "The Moneylenders Act, 1900"; *Strahan*, "Mortgages"; *Attenborough*, "Pawnbroking"; *Reed*, "Bills of Sale".

Scotch.—Gloag & Irvine, "Rights in Security"; *Green's* "Encyclopædia of Scots Law"; *Wallace & M'Neil*, "Banking Law".]

ADDENDUM

The Moneylenders Act, 1911, declares that any agreement with or security taken by a moneylender is valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the non-compliance of the moneylender with the requirements of the Acts. Any payment or transfer made *bona fide* by any person on the faith of the validity of any such agreement or security and without notice of any such defect is valid in favour of such person. In either case the moneylender is liable to indemnify the borrower or other person prejudiced by this enactment, but nothing renders valid an agreement or security in favour of an assignee or holder for value who is himself a moneylender. A person is not to be deemed to have had notice because a defect would have been discovered by a search of the register.

With regard to the use of the word "bank" by moneylenders, see Introduction to Part IV.

CHAPTER XIII

WILLS, PROBATE, AND ADMINISTRATION

Wills—Rights and Duties of Executors or Administrators—Death Duties—Wills in Scots Law.

WILLS

Capacity to Make a Will

An initial question which naturally presents itself to one who is desirous of arranging for the succession to his estate after his decease is as to whether any legal personal disability may prevent effect being given to his wishes. On this point it may at once be stated that every testator will be presumed to have been in the possession of the requisite "sound disposing mind, memory, and understanding" until the contrary is proved. Should it, however, be established as a fact that a testator was not in full possession of his senses at the time of making his will, that he was either a lunatic or an idiot, or even so drunk as not to know what he was doing, then those who would in the ordinary course of events have succeeded to the estate may invoke the aid of the Courts and have the testamentary dispositions made by such person set aside. Important considerations are knowledge on the testator's part of the extent of the estate at his disposal, and intelligent reasons for preferring certain persons as the objects of his bounty and for excluding others therefrom. As to blind and deaf and dumb persons, the only difficulty is the establishing by evidence that they sufficiently knew and approved of the contents of the documents put forward as their wills. A testator may have been of sound disposing mind, and yet his dispositions may be set aside as having been made under the influence of force or fraud of such a character as to destroy the exercise of discretion in one of the testator's age, sex, or state of health.

No will made by a person under twenty-one years of age is valid.

Married women have now full capacity to acquire, hold, and dispose by will or otherwise of any separate property possessed by them, and separate property for this purpose includes all real and personal property belonging to them at their marriage or acquired by or devolving upon them afterwards, including wages and earnings obtained in any employment, trade, or occupation.

Form and Requisites of a Will

The only wills not in writing to which effect will be given are those of soldiers and sailors in actual service and dealing solely with personal property. But a nuncupative will by a soldier declared before witnesses will not be good where the soldier was at the time not on an expedition against an enemy but quartered in barracks at home or in the Colonies; and such a will by a sailor while in a British port or dwelling on shore will not be good, though if declared by a seaman temporarily at a port of call or at Portsmouth on board a training ship it would be privileged.

With the exceptions just mentioned, no wills are valid unless in writing and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and the testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time, who should attest and subscribe the will in the presence of the testator. For writing material, paper or parchment is naturally to be preferred, and the writing ought to be in ink, although if in pencil untampered with effect will nevertheless be given to it. The words may be in any language and in

any form of writing which can by the application of known rules be interpreted. And no technical phraseology need be followed; the important matter is that the testator's intention can be clearly gathered from the contents. In simple cases, therefore, a solicitor's assistance is unnecessary; but if a testator has any doubt as to his ability to express his intentions in plain English, or if bequests of a complicated nature are intended to be made, obviously professional assistance will be valuable. No stamp need be impressed on a will.

The following short form of will contains the essential parts of a testamentary document, and will serve to illustrate the usual phraseology of such a document:—

"I, [*insert name in full, together with address and description*], hereby revoke all former wills and codicils made by me, and declare this to be my last will and testament; I appoint [*insert names of executors in full, together with their addresses and descriptions*] to be the executors of this my will; and I direct my said executors or the survivor of them, or the legal personal representatives of the survivor of them, as soon as may be after my death, to pay out of the estate left by me my just debts, funeral expenses, and the death duties payable in respect of my estate, and also the following legacies, to be paid free of legacy duty, namely, to each of the said [*names of executors*] in consideration of his undertaking the office of executor the sum of £50; to the .... Hospital at . .... the sum of £100 to be paid to the treasurer for the time being thereof; and to my wife [*name*] all the furniture and effects in or about my dwelling-house together with paraphernalia in her possession or reputed to belong to her; and I direct my said executors or the survivor of them, or the legal personal representatives of the survivor of them, to invest and hold the residue of my estate in trust to pay to my said wife [*name*] the income derived therefrom during her lifetime, and on her death or in the event of any of my children surviving me on her death not having attained the age of twenty-one years, then on the attainment by the youngest of my children of the age of twenty-one years to divide the capital among my children surviving me as aforesaid or their legal personal representatives in equal shares.

[*Signature of testator.*]

Signed by the testator [*name*] as his last will and testament, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as wit-

[*Signature of two witnesses, each with address and the word "witness" appended.*]

A will, be it noted, speaks from death, and confers upon the parties purported to be benefited thereby no present rights. The provisions made by a will may therefore be altered or superseded at any time. A will once executed, however, must not be tampered with. Should it turn out to have been informally executed, or should alterations of its provisions be desired, either the necessary corrections may be made and initialled on the existing will, that being then reattested before two witnesses, or a codicil may be executed with all the formalities of a will incorporating the informally executed will or embodying the desired alterations, or a new will may be executed revoking and superseding the former testamentary document. Where several unrevoked testamentary documents are left behind all will be given effect to, and should there be contradictory provisions the last in order of date will prevail. Erasures, interlineations, or other alterations should not be left without being initialled by the testator and the witnesses to his signature, and they should be referred to in the attestation clause thus: "The erasure in line ..... and the interlineations between lines ..... and ..... having been first inserted".

As to the signature of the testator, that is required to be at the "foot or end" of the will only; but where a will consists of several pages, each should be signed, and all should be so referred to or connected together as to show that they were executed as one document. "Foot or end" has the common meaning that the signature is "so placed at, or after, or following, or under, or beside, or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will". A testator known by an assumed name may sign by such name, but it is advisable to make his identity clear by further references in the body of the will. A testator may also make a mark instead of his signature, or allow his hand to be guided in proper circumstances where he requires such aid. A third person may also, in the testator's presence and by his direction, sign either the testator's name or his own name on behalf of the testator, the mode of signing being described in the attestation clause. In every case the testator's signature should be affixed prior to the signatures of the witnesses.

As to the attestation of wills, no form is by law necessary, but it is better to include the usual clause. The witnesses need not see the entire will, or know its contents, but they should take care to see the act of signing or to hear an acknowledgment of the testator's signature. They should be both present together, and sign or make their marks as witnesses under the gaze of the testator. A person intended to take under a will, or the

wife or husband of such a person, should not attest the will, for the result would be to invalidate the bequest to such person, and so in part or in whole to nullify the will.

It should be noted that a will disposing of real property situated in England must always be executed in the English form, but that every will made out of England is, as regards personal estate, well executed if made according to the forms required either (1) by the law of the place of execution, or (2) by the law of the testator's domicile (either of origin or acquired at the time of making the will).

Legacies

It is lawful to devise, bequeath, or dispose of by will all kinds of estate possessed by a testator, whether realty (including freeholds, copyholds, and incorporeal hereditaments such as rights of light, air, and way) or personalty (including leaseholds, stocks and shares, debts, money, goods and chattels); and sometimes even property to which a testator is not entitled may likewise be controlled, as, for example, where the testator has by a settlement, will, or other document a power of appointment by will. A legacy of so much money or estate is a *general* legacy, while a legacy of a particular chattel is a *specific* legacy. The distinction is sometimes of importance, for should a testator have parted in his lifetime with the subject matter of a specific legacy the legatee will get nothing; and again, should a testator's estate be insufficient to pay his debts and legacies in full, general legacies will suffer before specific legacies can be touched. A legacy may be left absolutely, or some condition may be attached to its vesting in the legatee, provided that such condition does not infringe the rules of public policy, as by encouraging immorality or unreasonably restraining marriage. Should a debtor bequeath to his creditor a sum equal to or larger than the amount of his indebtedness without any qualification, the legacy will be deemed to be a satisfaction of the indebtedness, but such a presumption will not arise where the bequest is of a specific chattel, or where the circumstances under which the indebtedness was contracted show that a different result was contemplated. A legacy to "children" means legitimate children only, and therefore illegitimate children intended to be benefited must be named or otherwise distinguished. If a father leaves a legacy to a child and subsequently in his lifetime provides a portion for such child, the portion will be deemed to have superseded the legacy.

In general, where a legatee dies before a testator, the legacy lapses and falls into the testator's residuary estate. But a testator may prevent that result by expressing the bequest as to the legatee *or* his personal representatives, or to the legatee and in the event of the latter predeceasing the testator, then to some other legatee named in substitution for the first-mentioned legatee. A legacy left to a child or other descendant of the testator does not, however, lapse through death in the testator's lifetime, provided such child has left issue living at the time of the testator's death. A legacy also which is left to someone as trustee will not lapse by reason of the death of the legatee. Although legacies vest as from the date of the testator's death, they are not payable until a year has elapsed.

Revocation of Wills

Reference has already been made to two methods whereby wills may be revoked, namely, (1) by executing a subsequent will expressly revoking previous testamentary dispositions, and (2) by executing a subsequent will wholly inconsistent with the previous one. A will may also be revoked (3) by its destruction coupled with an intention on the part of the testator to revoke it. A will accidentally or fraudulently destroyed may yet be proved by the production of a copy or draft or other evidence of the contents. And it is insufficient revocation merely to strike the writing or signature through with a pen. A will may also be revoked (4) by the marriage of the testator after the making of it.

A will which has been revoked by any of the methods just mentioned may be again revived only by re-executing it or by executing a codicil expressly reviving it.

Distribution in Cases of Intestacy

All the estate of a deceased person, whether real or personal, descends in the first place upon that person's legal personal representatives, that is to say, his executors, where executors have been nominated, or his administrator, where no executors have been nominated and in cases of intestacy. And where the personal estate proves insufficient to meet the death duties and the debts of the deceased person, his real estate is available for the purpose. After payment of the debts and death duties, however, different rules apply respectively to the distribution of the realty and to the distribution of the personalty. Where a will has been left disposing of all the estate, the distribution will of course be according as the will may dictate. But where a person dies intes-

tate, subject to the custom of gavelkind (descent to all sons alike) in Kent, and to the custom of Borough English (descent to the youngest son) in certain ancient boroughs, real estate descends (1) where the deceased person leaves a wife but no blood relations, subject to a life interest in one-third to the wife, to the Crown; (2) where a wife and descendants are left, subject to a life interest in one-third to the wife, to the eldest son, or in the event of the latter's death to his eldest son, or failing sons to his daughters equally, or failing issue of the eldest son then to the other sons in order, and failing sons to the daughters equally as coparceners, the eldest son of any daughter taking his mother's share in case of the latter's death; (3) where a wife dies leaving a husband and children, the whole to the husband for life, and then to the eldest son or other person entitled as in the preceding case; and (4) where no descendants are left, the whole goes, subject to the life estate of any husband or wife, to the father, then to the eldest brother and his issue, then to other brothers in order, and to sisters and their respective issue, then to the grandfather, and failing lineal ancestors on the father's side or issue of such ancestors, to the mother and her relations. In all cases where a wife survives and there is no issue, the wife is entitled to £500 out of the whole estate left, both real and personal (Intestates Estates Act, 1890, ss. 1, 2).

On the other hand, in cases of intestacy, personal estate descends, (1) where the deceased person leaves a wife but no blood relations, as to £500 and half after that to the wife absolutely, and as to the remainder to the Crown, or, where there are next of kin, to the next of kin, as determined by the rules applicable to the cases next mentioned; (2) where a wife and descendants are left, as to one-third to the wife, and as to the rest (and, where no wife survives, as to all) to the children (female as well as male, and married as well as single) in equal shares, the families of deceased children taking their parent's share; (3) where a wife dies leaving a husband and children, as to all to the husband to the exclusion of the children; and (4) where no husband or wife or descendants are left, as to all to the father, then to the mother, or, if brothers and sisters and their descendants also survive, equally among the mother, brothers, and sisters, whether of whole blood or half-blood, the children of a deceased brother or sister taking their parents' share, then, failing all the last-named relations, to the grandfather or grandmother before uncles and aunts, who, however, will share equally with nephews and nieces should there be no grandfather or grandmother or nearer relations alive.

Probate and Letters of Administration

To become vested with a legal title to act, an executor must prove the will appointing him, that is, deposit the original will at the Probate Registry, pay the estate duty, and obtain a certified copy of the will sealed with the seal of the Court, and bearing a note signed by one of the registrars to the effect that such will has been duly proved. Similarly, an administrator acquires his title to act by obtaining letters of administration at the Probate Registry. Application may be made to a district registrar where it appears on affidavit that the deceased person had a fixed place of abode within his district. Should litigation arise over the matter, the cause will be decided in the Probate, Divorce, and Admiralty Division of the High Court of Justice, unless the real estate of the deceased person is under £300 without deduction of mortgages and the personal estate is under £200 without deduction of debts, in which case the County Court of the district in which the deceased person had a fixed place of abode will have jurisdiction. The jurisdiction of the English Courts is confined to cases of real estate in England and personal estate in or in transit to England at the time of death, and does not extend to assets left abroad, which must be dealt with according to the law of the jurisdiction to which they are subject. And in all cases where there is a conflict of domicile, it is the law of the deceased's domicile which should primarily regulate the grant of probate or letters of administration, the grant so obtained being then resealed or confirmed in this country so as to be available in respect of assets here. In respect of certain property, no probate or letters of administration is required to be produced—for example, deposits in the Post Office Savings Bank not exceeding £100, deposits in other savings banks or shares in industrial societies not exceeding £50, naval seamen's effects not exceeding £100, and soldiers' and merchant seamen's effects not exceeding £50.

Probate or letters of administration must be obtained within six calendar months after the death of the testator or intestate, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, under a penalty of £100 and a further sum at the rate of 10 per cent on the amount of the stamp duty payable. An executor or administrator may nevertheless, immediately after the death of the testator or intestate, take possession of loose property, pay debts, &c., and otherwise act in matters in respect of which production of his title is not required. Should

an executor desire to renounce his office, he must do so in the statutory form to be obtained at and recorded in the Probate Registry. Executors and administrators failing to decide within a reasonable time whether they shall assume office or not can be compelled to take one or the other course by the process known as citation.

In ordinary circumstances, where there are no questions about the validity of a will, and where there is no contest with parties interested in the estate, a will may be proved in common form. But in exceptional circumstances, where there are such questions and contests, a will should be proved in solemn form by summoning all parties interested to attend the proof and show their grounds for opposition. Where a will has been merely proved in common form, the parties interested may oppose the proof by entering what is called a caveat at the Registry, and they may within thirty years call for proof of the will in solemn form. In all cases the executor must attend in person at the Probate Registry. There he must furnish an affidavit verifying a schedule setting out in detail the amount of all the real and personal estate of the deceased person, so that the estate duty payable in respect of such estate may be assessed by the Commissioners of Inland Revenue. Probate may be subsequently revoked if a later will be discovered, or if the probate be obtained by fraud, or where proof in solemn form has been called for and the executor has failed so to prove the will appointing him.

Letters of administration again are necessary in all cases where a person having estate has died intestate, or has died leaving a will not disposing of all the estate. Where a will has been left which omits to appoint executors, or where executors have been appointed but do not desire to act, administration *cum testamento annexo* (with the will annexed) will be granted to the next of kin or in some cases to a creditor. Other exceptional forms of administration are *de bonis non* (of estate unadministered), where an executor has acted but died without completing his administration, *durante minore aetate* (during minority), where an executor is under age at the time when he is called upon to assume the administration, *pendente lite* (pending an action), where the executor's rights are contested, and *durante absentia* (in absence), where the executor is beyond the sea at the time of the testator's death. Where the deceased person leaves a widow, she will in general be preferred to any of the next of kin, and a husband has the exclusive right to administer the estate of a deceased wife. After a husband or wife, the next of kin, females as well as males and half blood as well as whole blood, will be favoured, children first, then other lineal descendants, and then lineal ancestors, brothers and sisters, grandfathers and grandmothers, uncles, aunts, nephews and nieces, great grandparents, and lastly cousins in the same degree. If the next of kin do not apply, any creditor of the deceased person may call upon them by citation to accept or refuse the office, and on refusal himself obtain a grant of letters of administration. As in the case of applications for probate, so applications for letters of administration may be made either at the registry of the district where the deceased person had his usual place of abode, or at the principal registry at Somerset House, London. Like an executor, the applicant for letters of administration must make affidavit upon one of the forms supplied at the registry verifying the details of the entire estate to be administered, and in addition he must enter into a bond with a surety or sureties for the due administration of his duties. An application may be opposed by a caveat being lodged with the registrar on behalf of the competing person. Letters of administration may be revoked on the ground of fraud or misrepresentation, or in case the administrator appointed should become insane or be otherwise incapable of acting.

RIGHTS AND DUTIES OF EXECUTORS OR ADMINISTRATORS

Whilst, as we have just seen, an executor or administrator must, in order to gain authority to gather in and deal with outstanding estate, take out probate or letters of administration according to the circumstances of the case, the estate of the deceased person nevertheless vests in him as from the date of the death. Sometimes even one who has no title to be either executor or administrator may become saddled with the liabilities of the office; for example, if a stranger intermeddles with the estate he becomes executor *de son tort*—by reason of his unlawful conduct—and as such may be sued by one who may be injured in consequence. Executors and administrators are entitled to be reimbursed out of the estate their reasonable out-of-pocket expenses, but not additional remuneration for their trouble or loss of time.

The first duty of an executor or administrator is of course to provide for the deceased person a decent funeral, having regard to his wealth and station in life. Then the estate duty payable

on the grant of probate or letters of administration must be satisfied. Then the outstanding estate must be collected, including debts due to the estate. Actions brought by the deceased person and still in progress at the time of his death may be brought to a conclusion by his executor or administrator, the sum or damages recovered being added to the estate. An executor or administrator may compound or compromise debts or allow time for their payment. Debts due by the deceased person must also be paid, and these should be advertised for in one London and two local newspapers. Debts should be preferably paid in this order: (1) funeral expenses, (2) rates and duties, (3) judgment debts, (4) general debts, (5) legacies. If the estate is insufficient to pay all debts in full, the creditors of an inferior class must give way to those of a superior class and be content with a dividend in proportion to the estate. An executor, however, may retain in full a debt due to himself, and he may give a preference to any creditor over other creditors of the same class, and even pay a debt which is barred by the Statutes of Limitation. If he desires to carry on the deceased person's business, an executor should as a rule obtain an order from the Court for the purpose. Contracts entered into by the deceased person and left incomplete at his death must, however, be carried out, unless they depend upon the personal ability and skill of the contracting party.

An executor or administrator cannot himself, directly or indirectly, purchase the deceased person's estate. The reasonable market value must always be obtained, and this result will be best secured by a sale by auction.

For torts or injuries sustained by the deceased person no action can be brought by his executor or administrator unless they involve damage to his estate, when an action will lie. But where the death was occasioned by the wrongful act of another person, an action will lie in respect thereof at the instance of the executor or administrator on behalf of the wife, husband, parents, or children, provided it be brought within twelve months from the death. For torts and injuries committed by the deceased person, his executor or administrator incurs no liability unless such torts and injuries have caused damage to the property of a third person, in which case the latter may, within six months from the death, bring an action in respect of them.

Where there are several executors or administrators, each has full authority to act without the sanction of his colleagues. For a *devastavit*, that is, loss through negligence or misconduct, however, the colleagues will not be answerable except where they may have connived at it in some way. The guilty executor or administrator must himself make good such a loss out of his own possessions. And, while an executor or administrator reasonably contracting as such is entitled to reimbursement out of the estate administered, yet where the assets prove insufficient he will be personally liable to the other contracting party to supply the deficiency. An executor or administrator must not keep any large portion of the estate uninvested in his hands, for, if he do so, interest at the rate of 4 per cent may be claimed against him; and if he have employed the funds in his own business and made a profit by such employment the full amount of such profit may be claimed. Should disputes arise between executors or administrators, the appropriate remedy will be by action in the Chancery Division of the High Court of Justice, or, where the value of the estate does not exceed £500, in the County Court.

As to the investment of funds, a will may give special latitude to an executor in this matter, but where the will is silent on the subject, and in cases of intestacy, executors and administrators may secure protection by investing the estate in their hands in any of the following securities: (1) British Government stocks; (2) real or heritable securities in Great Britain or Ireland; (3) Bank of England or Bank of Ireland stock; (4) Indian Government stock: (5) certain corporation and county council stocks; (6) certain railway debenture, guaranteed or preference stocks; and (7) certain Colonial stocks. (See also Part IV.)

DEATH DUTIES

Estate Duty

The main duty payable in respect of estate passing on a death is Estate Duty. This duty is payable in respect of both real and personal estate, whether settled or unsettled, the market price at the date of the death being taken as the value, subject to an allowance in respect of depreciation caused by reason of the death of the owner. In case of dispute as to the value of real (including leasehold) property an appeal now lies to a referee appointed from among Fellows of the Surveyors' Institution, and ultimately to the High Court, or, where the value has been fixed at not exceeding £500, to the County Court. As to when estate is regarded as passing on a death, it may be laid

down in general terms that whenever an estate or interest in property comes into or is brought nearer the possession of another person than the deceased person on or by reason of the latter's death, then estate duty is payable in respect of the benefit accruing to such other person. And not only are gifts *mortis causa* liable to be assessed, but so also are gifts of any kind not exceeding in the aggregate to any one donee £100 in value or amount made within three years of the death, except gifts made for public or charitable purposes, or in consideration of marriage, or reasonable as part of the normal expenditure of the deceased person. Where money is invested in the joint names of the deceased person and other person or persons, the latter's benefit by reason of survivorship falls also to be assessed. (For scale of duty see further, Chapter XXVIII of this Part.)

As to small estates, such as do not exceed £100 are free from duty. And where the gross value exceeds £100 but not £300 all death duties may be satisfied by an inclusive payment of thirty shillings; and where the gross value exceeds £300 but not £500, by an inclusive payment of fifty shillings.

Where there is settled property the extra settlement estate duty payable is at the uniform rate of 1 per cent.

Legacy and Succession Duty

As to legacy and succession duty, the rates are, for lineal ancestors and descendants and widows and widowers, 1 per cent; for brothers and sisters and their descendants, and the wives and husbands of such, 5 per cent; and in other cases, 10 per cent. But the one per cent duty is not levied where the total estate does not exceed £15,000, nor where the total legacies or successions coming to the same individual from the same predecessor do not exceed £1000, whatever may be the amount of the total estate. And a widow or a child under the age of twenty-one years may claim exemption where her or his total succession does not exceed £2000, whatever may be the amount of the total estate. Lastly, property left for objects of national, scientific, historic, or artistic interest is exempt.

Besides the above-mentioned duties, increment value duty at the rate of £1 for every complete £5 of the increment value of land may also fall to be collected upon the occurrence of a death. The increment value of land is the amount (if any) by which the site value may prove to exceed the original site value as fixed by the Commissioners (See also Part I, Chapter VIII.)

WILLS IN SCOTS LAW

A will to be valid in Scots law requires no particular form, but it must be in writing, signed by the testator. Effect will be given to a holograph will signed by the testator alone without witnesses, and even to a mere draft or memorandum put up with a principal will, and showing a testamentary intention that effect should be given to the words used. And what has just been stated applies equally to real and moveable estate. It is in every case a question of fact whether an alleged will is a concluded testamentary act or merely a memorandum of a deliberative nature intended to be completed at some future date. A legacy by word of mouth is good up to one hundred pounds Scots (£8, 6*s.* 8*d.*).

Males above fourteen and females above twelve may, without consent, dispose by will of moveable estate. Complete testamentary capacity is only acquired, however, on the attainment of full age. While marriage does not in Scots law revoke a will, revocation may in circumstances be implied where a child is born to a testator after his making of a will, and either after or just before his death.

In important cases a formal disposition and settlement should be prepared by a solicitor, but in other cases the form given above will be of assistance. The usual attestation or testing clause in Scotland is: "In WITNESS Whereof, these presents, consisting of this and the.....preceding pages, with the marginal addition of.....words on page.....hereof, written by.....of....., are subscribed by me at Glasgow on the.....day of .....before these witnesses.....of.....and..... of..... (*Here follow the signatures of the testator and witnesses*).

It must not be forgotten, however, that it is a peculiar feature of Scots law that with regard to moveable (i.e. personal) property no person is entitled to dispose by testament of more than that share which is technically known as the "dead's part" if he is survived by a widow or children, or both, since a testament which encroaches on the widow's *jus relictæ* or the children's *legitim* may be reduced at the instance of the widow or children of the testator in so far as they are concerned. Where a father dies leaving a widow and children his free moveable or personal estate suffers a tripartite division, one third being divisible amongst his children equally as *legitim*, one-third going to the widow as *jus relictæ*, and the remaining third, known as the "dead's part", being that portion of

which he may dispose by testament in any manner he pleases. If, however, he does not dispose of the dead's part by testament, it falls to his children as his executors. If the father leaves children but is predeceased by his wife, or if the wife renounces her rights by marriage contract, one-half of the moveable estate falls to the children as *legitim*, the remaining half being "dead's part". Where the husband leaves a widow but no children, £500 and one-half of his remaining moveable estate falls to the widow, the other half being dead's part. By the Married Woman's Property Act of 1881 the children of a marriage have the same rights of *legitim* in their mother's estate as they have at common law in their father's. The claim of the children or of the widow may be defeated by the provisions of an ante-nuptial marriage contract in lieu or satisfaction of the claims for *legitim* or *jus relictæ*. No provision in a post-nuptial contract, if not accepted by the children, can defeat their claim to *legitim*. The eldest son or heir in heritage is excluded from claiming *legitim* with his brothers and sisters unless he chooses to collate the heritage with them. With regard to the heritable estate of her husband, the widow possesses certain rights known as "terce", i.e. the liferent of one-third of the estate, and correspondingly the husband of a deceased wife possesses a right known as "courtesy", i.e. the liferent of his wife's heritable estate, provided there has been a living male child who is, or would have been had he survived, his mother's heir in heritage.

[AUTHORITIES.—*Jarman*, "Wills"; *Theobald*, "Wills"; *Ingpen*, "Executors and Administrators". *Scots Law.*—*M'Laren*, "Wills and Succession".]

CHAPTER XIV

PATENTS, DESIGNS, AND TRADE MARKS

Patents—Designs—Trade Marks

PATENTS

Introductory

Patent Law is often looked upon as a branch of our legal system inherently difficult of comprehension, and consequently matter only for the lawyer. This opinion has been fostered by the ponderous tomes which have been issued from time to time, and which, although of immense value to the legal practitioner, have ill served the purpose of the individual desirous of rudimentary acquaintance with general principles. Principles of patent law are relatively few and easy of comprehension; their application, however, is often difficult. Yet in that majority of cases which present no unusual complexity, the principles can be applied with comparative ease. Other reasons, too, may be adduced as responsible for the popular opinion as to the intrinsic difficulty of patent law. Thus, patent law is usually made known through cases which are decided in the Courts where peculiarly difficult problems call for decision, and it is forgotten that these cases form but a slight percentage of patents which are the subject of daily working, and which, owing to the respective rights of the interested parties being free of doubt, are never thrust before the public gaze. Court cases, therefore, must not be regarded as typical. Neglect, too, to separate the question of the interpretation of the patent specification from other problems which present themselves has been conducive to the popular opinion. A further reason is the failure to distinguish between legal principles and technicalities of the industry with which a patent is concerned. There are technicalities in law and technicalities in industries—a distinction which cannot be too clearly emphasized. If a clear line of demarcation is drawn between technicalities industrial and manufacturing and technicalities which solely relate to patent law, many difficulties which confront those unfamiliar with the law will be found to vanish, and the real issues upon which so much depends will be brought to light.

In the following outline patent law is presented as a series of simple principles disentangled from the circumstances of particular cases and readily capable of general application.

Nature and Origin of Patents; Conditions of Validity

Patents for inventions confer monopolies for a limited period, and are granted nominally by an exercise of the Royal Prerogative. In exchange for a patent, the Crown receives on behalf of the public a complete divulging of an invention, with directions for its carrying out or practising in as ample a fashion as the inventor himself knew. The information given by the inventor forms the *quid pro quo*—the "consideration" for the grant. In the reign of James I the Statute of Monopolies of 1623 forbade the granting of monopolies by a mere exercise of the prerogative, except in definite instances, a practice which had grown up and flourished in the preceding reign of Elizabeth. Among the exceptions set out in that prohibitory statute was the granting of patents for inventions under certain well-defined conditions, and it is in virtue of this exception that the Crown still grants these limited forms of monopoly. Accordingly, the validity of a patent is checked by its adherence to the conditions laid down in the

Statute as modified by subsequent Acts of Parliament and expounded by judicial decision. The subsequent Acts have been consolidated by the Patents and Designs Act, 1907, which has been amended slightly by an Act of the next year. The Act has been supplemented by Rules made thereunder by the Board of Trade, and is aided by the large body of practice which has grown up in connection with the granting of patents by the Patent Office. The sixth section of the Statute of Monopolies of 1623, in which the basis of the present law is to be found, runs as follows:—

"Provided also and be it declared and enacted that any declaration before-mentioned shall not extend to any letters patent and grants of privilege for the term of 14 years or under hereafter to be made of the sole working or making of any manner of new manufacture within this realm to the true and first inventor and inventors of such manufactures which others at the time of making such letters patent and grants shall not use so as also they be not contrary to the law nor mischievous to the State by raising prices of commodities at home or hurt of trade or generally inconvenient. . . ."

From this section it will be seen that the conditions antecedent to the grant of a valid patent are, that (1) the term of the patent or monopoly must not exceed fourteen years; (2) the grant must be in respect of a manner of manufacture; (3) which must be new within this realm; and (4) the grant must be made to the true and first inventor: while (5) others must not at the time be using the manufacture; and (6) the grant must not be contrary to the law, mischievous, or generally inconvenient. In addition, the patentee must completely fulfil his part of the bargain as regards the consideration for the grant. In doing so, among other matters, the full specification of his invention must be deposited in the proper quarter, and thereby rendered available to the public.

It will be convenient to deal with each of the points in succession and show how the section of the Statute of Monopolies has been construed and eked out by the judges, and how, resulting in the Act of 1907, the provisions of the section have been varied by Parliament.

It is to be observed that when a section of an Act is here mentioned without further identification, reference to the Patents and Designs Act, 1907, is intended.

Term of the Patent

The normal term of a patent has been laid down as fourteeen years (sect. 17 (1)), the maximum provided by the Statute of Monopolies. This term is conditional upon payment of fees, so that in the event of fees being in abeyance beyond a specified time, the patent is at an end. In special cases, however, the term may be extended by the Supreme Court for periods of seven or fourteen years or less (sect. 18).

Manner of Manufacture

Unless a manufacture is present, no valid grant is obtained. The word "manufacture" covers not only the operation of manufacturing or a process, but also the article and substance produced. Since a specification of the manner of manufacture of the invention must be furnished in which the declaration is made that the specification describes the way in which the invention is to be made or carried out, it follows, not only from the Statute of Monopolies, but also from the terms of the specification, that a philosophical abstraction, the enunciation of a law of nature, or a problem which is to be solved, cannot by itself form the subject-matter of a patent. This is usually summed up in the often-misunderstood dictum that "you cannot patent a principle", although in another and ordinary sense of the term "principle" it can truthfully be said that every patent is granted for some principle or other.

Manufacture which is New

The invention must have the attribute of novelty, except in those clearly defined instances where the Statute or the Courts have excused it. Thus an invention is not novel if there has been a use of the invention either by the public or in public, or there has been publication of the invention in a document to which the public has had access. As regards judge-made exceptions to the rule as to novelty, experimental using of an invention in public does not by itself destroy the attribute of novelty. So soon, however, as the experimental stage is passed, the ordinary rule applies. Confidential disclosure is also treated as a non-publication.

So long as the invention is novel in this realm, the condition of novelty is satisfied. "Realm" for this purpose means at the present day Great Britain and Ireland and the Isle of Man. Consequently, although an invention might be known abroad, that alone would not derogate from the validity of the British patent.

If a public use of the result of a secret invention has taken place, a valid patent cannot then be granted, as this would in effect prolong the monopoly beyond what the law allows. Inventors therefore have to choose between applying for a patent on the one hand and disclosing their inventions, and on the other hand relying upon their

inventions remaining secret for prolonged and indefinite periods.

As regards statutory exceptions, the publication at certain exhibitions which have been certified by the Board of Trade is allowable. Also, an application for a patent in fraud of the inventor, or by use of the invention for a certain time during that fraudulent application, is not prejudicial to the inventor (sect. 15); nor is an anticipation of the invention in a patent specification of more than fifty years old, or in any provisional specification which has not been followed up by its corresponding complete specification (sect. 41 (1)). Further, if disclosure of an invention has taken place without the active or passive connivance of the inventor, and he, on learning of this disclosure, has at once applied for a patent, the patent is not invalidated by the disclosure (sect. 41 (2)).

Sufficiency of Subject-matter

Closely akin to the necessity of novelty in an invention is "sufficiency of subject-matter". This differs from novelty in that, although the actual invention may not have been produced or published before the date of the patent, yet if it only differs from what was previously known by something which exhibits no inventive ingenuity, the essential attribute of subject-matter is wanting. The result of the exercise of invention, actual or presumed, must be discoverable.

In order to prove the presence of invention it is necessary to show that the addition to, or the difference from, what had previously been achieved was not of such a character as required no invention. Cogent evidence of this consists in the fact that many master minds had been directed towards an end, and that the end had not been accomplished until the advent and through the instrumentality of the invention in question. In concrete instances the presence or absence of invention is one of the most troublesome questions with which patentees have to contend. The decision depends so much upon the personal view of the individual before whom the matter is laid, that only by a collation of a large number of examples, where subject-matter has been considered by the Courts, together with a consideration of the evidence of witnesses versed in the industries which were under examination, can reasonable conclusions be drawn. Manifestly invention should be present, otherwise the law would intolerably fetter manufacturers by compelling them to honour a patent as regards an article which, although not the same as that previously produced, yet differed merely, say, by an exhibition of the ordinary skill of a craftsman, indeed, by an addition or variation which the ordinary workman could and was paid to effect. A familiar example where invention is usually absent is in the case of "analogous user" so called, where, for instance, a mechanical contrivance has been applied in a manner or to a purpose which is not quite the same, but is analogous to the manner or purpose in or to which it has been hitherto notoriously used.

True and First Inventor

He is considered to be the inventor who originates, schemes, or discovers an invention either by the exercise of ingenuity or the result of a "lucky shot", and is the first to make application for a patent. Further, he who is the first to import an invention into this country and similarly applies for a patent is looked upon as the true and first inventor. In either case, however, the inventor's rights may have to give place under the International Convention to one who has previously applied for a patent abroad for the same invention (see p. 177). Inventions are sometimes "communicated from abroad" to an individual in this country, this fact being set down on the form of application for the patent. The communicatee is considered and treated as the inventor, the circumstances of the transaction also simultaneously showing him to be a trustee for the communicator. Statute law has introduced amendments whereby certain non-inventors may receive patents. Thus, if an individual has applied for a patent in certain foreign States or British possessions, he is entitled to apply for a patent for the same invention in this country whether or no he is the actual schemer or indeed the first to bring the invention into the realm. In addition, a non-inventor is permitted to be a co-patentee with the inventor, while in the case of deceased inventors the patent may be granted to their legal personal representatives (sects. 43 and 93). On the other hand, the actual inventors may be precluded from being patentees. A public officer may, in virtue of his position and of the duties with which he is entrusted, be considered as a trustee for the public, and therefore incapable of securing a monopoly for himself.

Although patent law may not refuse an inventor a patent, yet contractual relations may occasionally act so as to prevent a grant taking place; or, if a grant has been made, they may compel its recipient to divest himself of the patent by assignment or otherwise. As regards an infant, there is nothing to prevent him from receiving a patent, although by ordinary law he is incapacitated from negotiating it or entering into contracts without the intervention of a guardian.

Whether an individual is or is not an inventor is a question of fact which in many cases is easy of proof. Sometimes, however, the question is too difficult to settle satisfactorily. When this is so, any presumptions of inventorship that may be present are taken into full consideration. Thus, sometimes there is present the presumption that inventorship lies with one of the parties to a dispute such that the burden of rebutting it lies upon the other party. If, then, the other party is unsuccessful in proving himself to be the inventor, he will fail to secure his position as such. This position is often reached through the relation existing between master and servant.

Grant not contrary to Law nor Mischievous, &c.

There is also laid down as a condition that the grant shall not be contrary to law nor mischievous to the state by raising prices, nor be to the hurt of trade nor generally inconvenient. Nowadays the necessity of "utility" in an invention is founded upon this proviso. It is somewhat difficult to think of an invention which satisfies all the other conditions of validity and yet fails in utility, but the test of utility is always applied in a case in which the validity of a patent is questioned. In truth, the necessity is a legacy from the time of Coke, in an early period of patents, who laid down the doctrine that there must be present *urgens necessitas* and *evidens utilitas*. *Urgens necessitas* is no longer required, though traces of it were to be seen as late as the end of the eighteenth century. *Evidens utilitas*, however, is still pleaded in an action and correspondingly denied, although, in fact, it has little to do with the result of the action. The test of utility is applied in relation to the circumstances of the invention. Utility in the abstract is not required. Thus, although ladies' corsets may be considered by some to be harmful, yet when an invention consisted in improved corsets, utility was held to be present. One of the most telling facts in favour of utility consists in a defendant in an action for infringement adopting the invention against which he alleges want of utility. The Comptroller General is empowered to refuse a patent for an invention the use of which, in his opinion, would be contrary to law or morality (sect. 75).

International and Intercolonial Arrangements

A convention exists between Britain and certain foreign countries whereby a person who has applied for a patent in one of the countries is entitled to a British patent bearing the date of the foreign application, provided he applies within twelve months of the foreign date (sect. 91). This privilege is mutual as regards inventors. Most of the important foreign countries, such as the United States of America, Austria, France, Germany, Italy, and Japan, are parties to this convention. Britain has also entered into similar arrangements with certain of the British possessions. The specification accompanying an application made under the convention is published, if it is not already accepted, at the expiration of the twelve months from the original date.

The Specification

The consideration for the grant being the disclosure of an invention to the public, it has been found by experience that at the present day the best method of communicating the disclosure is by means of a written description or specification which is deposited at the Patent Office (see Part I, Chapter IX), and there, after the official acceptance has issued, laid open to public inspection. Drawings may be employed to supplement the description, and they are usually compulsory where the invention is of a mechanical nature. The description must be such that a person of competent skill can carry out the invention. At the same time, it must indicate what the public is prohibited from doing during the period of the monopoly. The specification which must then accompany an application for a patent must be either a "provisional" specification or a "complete" specification. If a provisional specification is filed, it must be followed up by the complete specification. In addition to these specifications, there is what may fairly be termed an "exhibitor's specification".

Exhibitor's Specification

Where an inventor desires to exhibit his invention at an exhibition certified by the Board of Trade without invalidating a subsequent patent through a prior publication of his invention, he must give notice of his intention to the Comptroller of Patents, and file with the notice a brief description of his invention (sect. 45). An Order in Council, however, may relieve the exhibitor from such notice and specification. This form of specification is rarely adopted, and the legal results accruing therefrom are to a great extent matters of surmise.

Provisional Specification

This specification must describe the nature of the invention. The description may be brief, but it must enable the invention, which is afterwards fully described in the complete specification, to be identified. Provided that the nature of the invention has been fairly and honestly disclosed, practical details for performing the invention need not be described; if details, however, appear, it does not follow that such must be adopted in the complete specification, as other and better means may be evolved in the interval between the filing of the two specifications. In view of the investigation to which complete specifications are subjected by the Patent Office (see p. 179), and the consequent possible excision of old subject-matter, it is not advisable owing to the requirements as to conformity between the complete and the provisional specification to limit the latter to its bare legal minimum.

The interval between the filing of the provisional specification and the complete specification enables the inventor to work out the details of the invention and to discover the best manner of performing it.

The filing of the provisional specification gives the inventor priority over another person who makes the same discovery or evolves the same idea, but who has failed previously to apply for a patent.

Complete Specification

Instead of filing a provisional specification and following it with a complete specification, the complete specification may be left with the application. In either case, the complete specification must, with particularity, describe the nature of the invention and the manner of performing it. Insufficiency or unintelligibility in the description will render the patent void. The specification must also be framed in good faith, and must disclose the best manner known to the inventor for performing the invention. Concealment of relevant information or statements intended to mislead the public result in an invalid patent.

It should be mentioned here that in some instances a specification alone is not sufficient. In the case of chemical inventions, the Comptroller may require, before acceptance of the complete specification, the supply of samples and specimens of the invention (sect. 2 (5)).

The specification must end with a succinct statement of what the applicant desires to protect. This statement may consist of a single claim or of several claims. The invention set out in each substantive claim must satisfy all the conditions for a valid patent, so that the presence of a single offending substantive claim renders the patent void.

In the case of inventions which are acquired by the Admiralty or War Office, the specification, if not already published, may be kept secret.

A single complete specification may be filed in respect of two or more concurrent provisional specifications for inventions which are cognate or modifications one of the other, and a single patent granted in respect of the whole of such application.

Construction and Interpretation of Specifications

In most patent actions, and indeed in almost every transaction in which patents are concerned, the ambit or scope of the invention which is involved has to be determined. This necessitates a construction and interpretation of the specification. The importance of construction whereby a knowledge of the exact boundary of an invention is obtained cannot be too highly rated. Although strict rules for construction cannot be laid down, yet it is possible to indicate salient considerations to which attention must be directed in order to arrive at the true meaning of a specification. Thus, for example, specifications must be construed like other written documents, ordinary words being given their natural meaning; construction is a matter to be determined by the Court only; the Court will exercise its own knowledge, but in general it is aided by expert evidence. Expert evidence is directed to explaining the working of the patented machine or process, the meaning of scientific and technical terms, and the state of knowledge in the particular industry at the date of the patent. In common with other documents, the specification must be considered as a whole; paragraphs in it must not be isolated and taken as though separate statements; nor must the claims at the end be interpreted apart from the description in the body of the specification. The invention, however, which is to be derived from and is pointed out by each substantive claim, must satisfy all the conditions necessary in an invention for a valid patent. Where a claim is capable of two interpretations, one of which would invalidate the patent, the Court will be disposed to adopt that interpretation which will have the effect of supporting the patent. One result of this is that if a claim would fail as a substantive claim, the patent may be saved by construing it as adjective or appendant to another and valid claim. Construction to a great extent is dependent on the purpose for which it is undertaken; so that for

one purpose, construction may lead to an emphasizing of one side of the invention, while, for another purpose, attention may be focused on another phase. In some instances it is possible, after considering what an alleged infringer has done, and after reading the specification, to decide forthwith that an infringement has been committed. Sometimes construction approaching completeness is necessary before the case in hand can be dealt with effectively. Complete construction of a specification results in an exact statement of the invention in such a form as to make the statement directly applicable to almost any set of circumstances. Usually, however, construction falls short of this, and proceeds only so far as is sufficient to deal with the case under consideration, and leaves construction to be effected still further when another case renders such a course necessary. It may be sufficient for construction to proceed only so far as to allot the invention to one or the other of two classes, which are technically termed "master- or pioneer-patents" and "patents-for-improvements". In a master- or pioneer-patent the invention is based on some underlying principle which is itself new, and what is described and illustrated in the specification is given merely by way of example. The claims in such a case will receive a broad construction, and the protected invention be proportionately widened in its scope. A patent-for-improvement, on the other hand, deals with improved means for effecting a known object or result. The invention in these circumstances is, in effect, confined to what is described and illustrated. The term "master-patent" expresses a relation between an invention and its successors in the same branch of industry to which the invention relates, successors such as improvements or modifications. The term "pioneer-invention" suggests the relation between the invention in mind and altered or collateral inventions. It must, however, be remembered that in every case a statement of the exact limits of an invention is the ultimate aim of all construction, and that when this aim is achieved the allotment of inventions to either of two classes, and such-like aids to the settlement of a case, together with the judicial utterances thereon, have no place.

Finally, complete construction may be said to result in the settling of such a "claim" as would have been the best that the patentee could have devised, if at the time the specification was drafted he was in possession of all the information that was in the possession of the Court which construed the specification, and at the same time possessed the same ability to express himself as was possessed by the Court.

Disconformity

An inventor in filling in the details of his invention as described in the provisional specification sometimes includes in his complete specification a further or different invention. In such a case disconformity is said to be present, and this, if not removed by amendment of the specification, formerly involved a nullification of the patent. Now, however, the patent is saved if the further or different invention was novel at the time of the filing of the complete specification and the patentee was its originator (sect. 42).

Examination of Specifications by the Patent Office

The Patent Office examines specifications, before their official acceptance, for formalities, sufficiency of description, disconformity (sects. 1 to 6), and for novelty as judged by specifications of not more than fifty years' standing (sects. 7 and 8).

As regards insufficiency of description, the Office may require the application for the patent to be post-dated to the date when a satisfactory amended specification was filed.

Disconformity, when present, may be remedied by excision from the complete specification of the disconforming invention, or by cancellation of the provisional specification and a re-dating of the application to the date of filing the complete specification (sect. 6 (3)).

If the invention to a large extent has been previously described in a specification not more than fifty years old, and the applicant's specification, on due notice having been given, has not been satisfactorily amended so as to limit its claim to that to which the inventor is entitled, the Comptroller is empowered, by way of notice to the public, to add to the specification a reference by number and year to the earlier specification.

When, however, the invention has been wholly and specifically claimed in the earlier specification, the patent may be refused.

Amendment of the Complete Specification

A patentee may find that his specification, after it has been officially accepted, is defective in that he has suggested or claimed novelty for something that is not novel, or has included an incomplete or incorrect theory that is not essential to the working of his invention. In such a case, application to amend the complete specification may be made to the Comptroller (sect. 21). The amendments permissible are limited to dis-

claimer, explanation, or correction, either in the letterpress or in the drawings, and must be such as not to cause the specification when amended to claim an invention larger than, or different from, the invention as originally set out. The request to amend may be opposed, the opposition being decided by the Comptroller with an appeal to the Law Officer. The Law Officers are the Attorney-General and the Solicitor-General for England. No amendment under this section 21 can be permitted by the Comptroller when and so long as any action for infringement or proceeding before the Court for revocation of the patent is pending.

In an action before the Court, the Court may allow the patentee to amend his specification by disclaimer.

Simple means are provided for the correction of clerical errors.

Provisional specifications, being records of the state of affairs with which the contents of the complete specification are compared, are but rarely allowed to be amended after acceptance.

Opposition to the Grant of Patent

Within two months from the advertisement of the official acceptance of the complete specification, the grant, which next follows, may be opposed on the following grounds: (1) That the invention has been obtained from the opponent; (2) that the invention has been claimed in a previous specification; (3) that the description is insufficient; and (4), that in effect, there is disconformity (sect. 11).

Fraud committed out of this country in respect of obtaining the invention is not a ground of opposition.

The opposition is dealt with by the Comptroller, his decision being subject to an appeal to one of the Law Officers of the Crown. The opposition may result in the patent being stopped, or on terms being imposed, or in the specification being amended. Costs may be awarded.

In the event of a patent being granted, and consequently the period of opposition having expired, the patent may be revoked on the same grounds as those upon which opposition might have been based, provided the proceedings are commenced within two years from the date of the application for the patent (sect. 26).

Letters Patent

The protection is conferred by the issue of Letters Patent. This sealed document is dated as of the date of the application for the patent, and sets out the extent of the protection and the conditions under which the monopoly is held. The monopoly, so far as damages for infringement are concerned, commences not at the nominal date of the patent, but at the date of the official "acceptance", i.e. the publication, of the complete specification (sect. 13).

As is usual in grants from the Crown in similar connexions, the document begins with the address from the sovereign. Then follow recitals which state the grantee's name, the title of the invention, that the grantee is the true and first inventor, that he desires the grant of a patent, that he has deposited a complete specification, and, finally, that the invention is for the public good. Thus the grantee makes certain suggestions to the Crown, either of which, if material and false, renders the patent void. Following the recitals is the grant or permission to make, use, exercise, and sell the invention within the United Kingdom and the Isle of Man. Then is set out the prohibition, which is the most important clause in the document. It forbids all subjects from using or practising the invention within the term of the patent without the consent of the grantee. The conditions under which the patent is held and its duration then follow.

Necessary modifications in wording are made where the circumstances require it.

A duplicate of the Letters Patent may be sealed at any time in case of loss or destruction of the original.

Patent in Lieu of a Revoked Patent

If a patent has been revoked on the ground of fraud, the Comptroller may, on application, grant to the true inventor a patent in lieu of, and bearing the same date as, the revoked patent.

Patents of Addition

If a patentee desires he may protect an improvement in or modification of his invention by a "patent of addition". By doing so, beyond the initial fees for obtaining the patent, no renewal fees are payable. A "patent of addition", however, stands or falls with the original patent, so that when the latter from any cause terminates, the "patent of addition" also comes to an end.

Fees for obtaining a Patent

The total cost of obtaining and maintaining a patent for the full period of fourteen years is £100. The initial fees are £5, but no further fees are payable until the end of the fourth year. The fees are then paid annually; for the fifth year, £5; for the sixth year, £6; and so on until the patent

expires. The total cost may, however, be paid in a lump sum. In the case of a patent of addition, no fees beyond those which are required to obtain the patent are payable.

Restoration of Lapsed Patents

Where a patent has expired by reason of the non-payment of a renewal fee, and such non-payment was unintentional, the Comptroller may order the restoration of the patent. The order may contain terms for the protection of persons who have used the invention after it has been declared void.

Extension of the Term of a Patent

In special circumstances, an extension of the term not exceeding seven or fourteen years may be obtained by petition to the High Court (sect. 18). It is essential for the invention to be one of exceptional merit, and for the remuneration received from the public to be inadequate. Other circumstances will also be considered, especially the reason for any want of success in exploiting the invention. Terms may be imposed, particularly where the petitioner is an assignee. In such a case it is usual to secure to the inventor a share in the profits accruing from the extension. Facilities are given for the petition to be opposed.

Register of Patents

The register of patents, which is kept at the Patent Office, is a record of matters affecting the grant, validity, continuation, and ownership of patents. Thus, among other matters, it contains the grantee's name, which is entered as soon as, but not before, the patent is granted. Notifications of payment of renewal fees, amendment of specifications, extensions of the patent term, revocations, assignments, and licences are also inserted in the register. Registration is not compulsory, and is made only upon request, which is accompanied by evidence *prima facie* as to title. The object of registration is to indicate the owner of a particular patent, and therefore the person who is entitled to assign, grant licences, and otherwise deal with the patent, and also to show what other dealings with the patent have already taken place. It is advisable in all cases to place upon the register notice as to variations in ownership wholly or in part, for if this is not done, a person is liable to have his title affected or defeated by some subsequent and unknown dealing with the patent. As regards matters of which the office has direct knowledge, an entry is made in the register accordingly. An erroneous entry in the register may be rectified by application to the Court of any person aggrieved (sect. 72).

Before registration takes place, the title-deeds and other documents which are produced at the Patent Office must be stamped to the same extent as other documents which transfer interests in property.

Transfer of Patent Rights

In accordance with the terms of the Letters Patent, a patentee may assign or transfer his rights to others, or he may grant licences to make or work the invention.

Assignment and Devolution.—An assignment of the entire interest in the patent may operate over the whole or a specified area only of the United Kingdom. The formal method of assignment is by deed, although, as in the case of other property, informal methods receive due recognition.

In case of death, the beneficial interest in the patent devolves on the executor or administrator. Whether the deceased was the sole patentee or whether he was a joint patentee with others, the same rule applies (sect. 37).

On bankruptcy, the patent as property passes to the trustee. It is an open question whether a patent is capable of seizure by the sheriff.

Government Use and Acquisition of Patents and Inventions.—Patents for inventions dealing with munitions of war may be acquired by the War Office or the Admiralty (sect. 30).

A Government department may use an invention after a patent has been applied for, and in such terms as may be agreed on with the patentee either before or after the use. In default of an agreement, the terms are settled by the Treasury (sect. 29).

Licences

A licence, instead of transferring the whole interest which another holds, merely enables the licensee to do what would otherwise be an unlawful act, and permits the licensee, who has not proprietorial rights, to work under the patent. A licensee, in the absence of express agreement to the contrary, is not permitted to challenge the validity of the patent, and may, therefore, suffer disadvantage in being compelled to continue payments in respect of a void patent. The number of licences granted may be unlimited, except in the case where the sole right of working or using the invention has already been exclusively conferred. Restrictions may accompany the licence, such, for example, as regards duration, or working or using in a specified area only; but any restriction is null

and void that is in restraint of trade and contrary to public policy (sect. 38). Licences may be granted in many ways, the formal method, however, being, as in the case of assignments, by deed.

Compulsory Licences

Since the grant of a patent confers the exclusive right to manufacture the protected article or work the patented process, it is necessary to safeguard the public against a patentee who utilizes his monopoly in a manner prejudicial to the public interest. Thus, a patentee may impose unreasonable terms for the purchase of the protected article, especially where the article is required in a new trade or industry; or he may work the patented process to an inadequate extent; and he may refuse to grant licences. In such circumstances, a petition for the grant of compulsory licences, or alternatively for the revocation of the patent, may be addressed to the Board of Trade (sect. 24). The Board, if satisfied that a *prima facie* case exists, endeavours to arrange an agreement between the parties. If unsuccessful, the Board refers the petition to the Court for decision. Provided the reasonable requirements of the public have not been met, the Court may order the grant of licences on terms it may think proper, or if of opinion that the grant of licences will not be sufficient, it can order revocation of the patent.

Compulsory Working of Patents

A patent may be revoked after the expiry of four years from its date on the ground that the patented article or process is manufactured or carried on exclusively or mainly abroad, provided that the patentee is unable to prove that the manufacture or process is carried on to an adequate extent in this country, or to establish satisfactory reasons why it is not so carried on (sect. 27).

Any person may apply to the Comptroller for the revocation of a patent on the ground specified, the Comptroller's decision being subject to appeal to the Court. Before, however, the patentee is called upon to defend his patent, the opponent must show a *prima facie* case for revocation — *Hatschek's Patents* (1909). (Reports of Patent Cases, Vol. XXVI, p. 228.) The judgment in this case sets out the circumstances in which an attack may be made on the patent, and the nature of the evidence to be adduced to meet it. Thus, whether the patent ought to be revoked depends in part on a comparison of the relative extent of the home and of the foreign manufacture. Importation of the articles is not of itself fatal to the patentee. In defending his patent, the patentee must be prepared to show that he has taken at least the same pains to develop the new industry in Britain as he has taken abroad. It is not sufficient for him merely to prove that he could not work the invention at home as profitably as he could abroad. It will also not avail him to show that there was no home demand, unless at the same time he could prove that he has done as much here as abroad to stimulate demand. In short, revocation or non-revocation depends broadly upon the answer to the question, whether he has used his monopoly fairly as between home and foreign trade.

Infringement

A patentee can protect and enforce the exclusive privilege to make, use, exercise, and vend the invention conferred upon him by the patent by bringing an action in the High Court against any person who infringes his monopoly. If he is successful in his action, he may obtain damages commensurate to the injury done to him, or he may be awarded the profits made by the infringer by the unauthorized use of the invention; but he cannot have both these remedies. Sometimes the delivery up to him of the infringing articles is ordered. In the case of old-established patents, or patents which have already been upheld in the Courts, an injunction restraining the infringer may be obtained before the trial of the action. The right of action passes with the property in the patent, except that a mortgagor can proceed without the mortgagee. A licensee cannot sue in his own name alone.

The defence to an action for infringement may consist of a denial of the validity of the patent as well as a denial of infringement, and the revocation of the patent may be sued for by way of counterclaim (sect. 32). A person who admits infringement may also defend himself from liability for damages by proving that he was not aware of, nor had reasonable means of making himself aware of, the existence of the patent. The mere marking of the article with the word "patent" without giving the number and year of the patent does not debar the innocent infringer from adopting this defence (sect. 33). As regards the validity of the patent, all the grounds on which the patent might be revoked on a petition to the High Court may be advanced against the patent.

The denial of infringement may be based on the plea that, even supposing the patent to be valid, the defendant was entitled to deal with the invention in the manner he has done. Thus, it is not infringement to re-sell when the invention was originally purchased from a properly authorized person; nor is mere experimental use of the inven-

tion in a *bona fide* attempt to improve upon it. The use of a patented invention on a foreign vessel for the purposes of navigation within the jurisdiction of Britain is also allowed by law, provided that a reciprocal privilege is granted to British vessels in the foreign country (sect. 48). On the other hand, infringement is committed by any of the following acts, namely: importation of the invention from abroad; the use of the invention when it has been purchased from an unauthorized person; infringement by one's servant; exposure of the invention for sale; putting together the parts for the purposes of instruction or otherwise; the sale of the essential parts separately with the intention of their being aggregated; the breach of a condition known to be attached by the patentee to the use of the invention; and manufacture while the patent is still alive with a view to selling on the expiry of the patent. Repairing a patented article may either be infringement or not infringement, according to whether or not the repairs amount to a renewal of the essential parts of the invention.

Suppose that acts such as those enumerated above are admitted, infringement may still be denied on the plea that in what he has been doing the defendant has not been employing the patented invention, but something else. This, coupled with the challenging of the validity of the patent, is the most usual defence, and raises for settlement the issues—(1) what, as a matter of fact, has the defendant been employing, which is to be determined by evidence; and (2) what is the patented invention, which must be ascertained by construction of the specification.

It sometimes happens that an action for infringement is brought by one patentee against another patentee, the issue between the parties being whether the defendant's patent is for an independent invention, or whether it is for an improvement on the plaintiff's invention, the use of which is necessarily involved in the use of the improvement. Even if infringement is found to have occurred, it does not follow that the defendant's patent is not valid; but the defendant cannot use his own invention in these circumstances without arranging with the plaintiff for the use of the foundation invention. If, in such a case, the holder of the improvement patent meets with a refusal of the necessary leave, or with an attempt to impose unreasonable terms, by the holder of the foundation patent, his remedy is to proceed for the grant of a compulsory licence.

In many instances the mere threat of an action for infringement will suffice to check the acts complained of by the patentee; but a patentee needs to be careful not to indulge in groundless threats, as otherwise he lays himself open to injunction and to an action for damages (sect. 36).

Patent Agency

Instead of an inventor himself applying for and obtaining a patent and negotiating its sale, &c., all the necessary steps may be carried through by an agent appointed by him for the purpose (see Vol. I, p. 181).

Offences

A fine of £20 may be inflicted upon any person who uses on his place of business or otherwise the words "Patent Office", or words suggesting that it is officially connected with the Patent Office, or uses the Royal Arms in virtue of the grant of Letters Patent merely, or describes himself as a patent agent when not registered as such.

Any person falsely representing that an article sold by him is patented, as by marking such article "patented", is liable to a fine of £5.

Scotland, Ireland, and the Isle of Man

The same law as to patents applies to Scotland, with slight modifications. In an action for infringement the provisions for calling in an assessor apply, and the action is tried without a jury unless the Court otherwise directs, but nothing affects the usual jurisdiction and forms of process. Offences punishable on summary conviction are prosecuted in the Sheriff Court. Proceedings for the revocation of a patent are in the form of an action for reduction at the instance of the Lord Advocate, or of a party having interest with his concurrence. Except in so far as it extends, the special jurisdiction under the Act does not affect the jurisdiction of the Courts, and "the Court" means any Lord Ordinary of the Court of Session, and "Court of Appeal" either Division of that Court. "Rules of the Supreme Court" mean Act of Sederunt. If any rectification of the register is ordered by any Court, a copy of the order is to be served on the Comptroller.

In Ireland all parties have their remedies as to patents as if granted to extend to Ireland only; the ordinary jurisdiction of the Courts is preserved, the expression "the Court" meaning High Court in Ireland. The same provision as to rectification of the register applies as in Scotland.

As to the Isle of Man, with savings for local jurisdiction, and forms of punishment of offences, the general provisions of the Act apply.

The Commercial Value of Patents

The value of a patent as a property is to be determined by reference to two sets of considerations. One of these sets deals with the probability of profit from a manufacturing and trading point of view, supposing the patent to be valid, and the other with the danger to which every patent is exposed of being found worthless on legal grounds. These considerations may be compared to the value of a building site as determined in part by the rent obtainable, and in part by the security of title. In the case of land, a doubt as to title is not of common occurrence, and therefore this consideration seldom enters into the matter; but when it exists it seriously affects the possibility of sale and depreciates the price, even if a sale can be effected. In the case of patents, however, the chance that the patent may be found to be invalid always enters as one of the prime considerations into the determination of its value. It is therefore incumbent on a prospective investor in a patent to take the best means of assuring himself on this point.

Opinions and Certificates

When a patent is offered to an intending purchaser or forms part of the assets of a company seeking capital from the investing public, it is usual for the promoters to deal with this aspect of the matter by citing the opinion of counsel on the merits of the patent from a legal standpoint. Sometimes an undue emphasis is placed upon the favourable character of such an opinion. It is well to remember that the conclusion arrived at by counsel must depend largely upon the material put before him. One of the greatest dangers run by a patent is the possibility that it may be upset on the ground of prior user, and this is a matter upon which those having extensive experience in the industry to which the invention relates can pronounce with more confidence than one whose information is, so to speak, secondhand. The opinion of counsel is more clearly within its own province in dealing with the risk of invalidation of the patent by prior publication. But here again the opinion is in large measure dependent on the work of those who have carried out a search among prior patents and in the literature of the subject. In a company prospectus the opinion of counsel is often backed by a statement or certificate furnished by the patent agent or expert by whom the search was made. Each case must, of course, be judged on its own merits, but as a general rule it may be said that, besides satisfying oneself as to the professional standing and competence of those offering opinions and certificates, it is necessary to be on one's guard against accepting such certificates and opinions as anything more than provisional.

Trade Prospects

Assuming that in any given case the validity of the patent may be accepted as a working hypothesis, the next step is to ascertain what prospect there is of the working of the patent being profitable. This is a matter essentially for the man of business, but certain of the considerations that apply appeal more especially to the commercial man, and others more especially to the manufacturer. Among these an important question is, supposing the patent to be valid, can the monopoly which it purports to grant be made effective? The most common difficulty confronting the patentee is that, in order to ensure validity, a narrow construction has to be put on the claim to avoid claiming something that can be shown to be old, and in that case competing inventions, outside the scope of the patent but equally efficacious commercially, may crop up all round it as soon as its value is generally recognized. The patentee has then to face the dilemma that if he attempts to bring the alleged infringers within the scope of the patent he may get his patent upset; while, unless he attempts to do this, his competitors may cut into the market to so great an extent as practically to deprive him of his monopoly. Those interested in the financing of a patent must be prepared to be bold in the attempt to obtain control over or to make arrangements with competing interests.

Another condition which leads to a similar result is that it may be difficult to trace and check clear infringements, either on account of the ease with which infringement can be carried on in secret, or on account of the expense of detecting and proving it in a Court of Law. This is a possibility which demands careful examination. If the nature of the invention is such that it may be pirated by numerous petty infringers individually not worth attacking, the result in the aggregate may very largely diminish the profits obtainable from the patent. Whether the monopoly can be made practically effective is therefore an important question in assessing the pecuniary value of a patent.

The most favourable kind of patent as regards certainty of profit is that which offers a cheapening of some article in which the manufacturer has already an established trade. In this case the probable profits can be gauged with some approach to accuracy, at any rate if the patentee is content

with the existing business. If, however, such a patent is employed as an instrument of competition, enabling the maker to extend his business by underselling competitors, the probable profits cannot be so nearly estimated. They will be dependent on the ability and judgment with which the power to sell at lower prices is made use of, and against the extension of business has to be set the lowering of price by which it is obtained.

While in the case just dealt with the expectation of profit is fairly sure, the scope which it offers to enterprise is comparatively limited. The greatest chances are presented by those patents which put before the public some new article, or an article so much superior to something already in use that purchasers are prepared to pay more for it. In this case the undertaking assumes a much more speculative character. What the chances are may in some instances be shrewdly guessed by one whose business it is to forecast the wants of the public or the demands of the market to which the invention is offered. But although the greatest opportunities are associated with patents of this kind, their proper exploitation calls for the application of the highest business ability and push, and the value of the patent as a property will very largely depend upon its falling into the right hands.

In connection especially with this class of invention there is the risk that they will not be found so satisfactory in their results when they come to be worked on a commercial scale as when they are worked merely experimentally. The rule is that an invention arrives at maturity only under a progressive series of patents. Unexpected difficulties may have to be overcome, and the success of the venture will depend upon the readiness and resource with which these can be met. There is also the question whether the proposed new industry will be dependent upon enterprise which may not be forthcoming in contributive or assisting industries. In forming an opinion on the various component questions involved in valuing a patent, it is of course necessary to take into account special conditions pertaining to the trade or industry to which the invention relates; whether, for instance, the proposed manufacture has only a limited field of application, or whether it appeals to the public at large or to extensive and widely spread existing industries; whether the demand is likely to be only a passing phase, or whether the invention seeks to satisfy some permanent public need; whether the article is to be put on the open market, or whether its adoption by large corporations or by the Government is essential to success; whether it can be introduced with little or no disturbance of capital already sunk, or whether it involves wholesale scrapping of existing plant or machinery.

Apart from enquiries of the kind outlined in the foregoing passages, it would be unsafe, notwithstanding the official examination to which it has been subjected, to treat a patent lately granted as having intrinsic value, entitling it to be regarded as good security or a valuable asset. Lastly, an emphatic caution should be given that a patent specification bearing the Official Reference to a previous specification should be subjected to especially searching enquiry.

Concluding Note

It only remains to add that it is generally recognized that some well-devised scheme for the protection of inventions for a limited period is of assistance to the development of manufacturing interests, with resulting benefit to the community. Patent law has proceeded in the direction of accommodating itself to the needs of a great industrial nation, and, where abuses have become apparent, the law has been amended. Probably among the more important reforms are those which have been the subject of recent legislation culminating in the consolidating Act of 1907. It would, however, be too much to expect that the present law will be found so complete that occasions for further improvements will not present themselves.

DESIGNS

Introductory

The first Statute dealing with Copyright in Designs was the Act of 1787, but the law is now to be found in the Patents and Designs Act, 1907, Part II, and the Designs Rules, 1908. The only test of a design is whether it is novel and original; utility does not enter into the question.

Registration

The registering authority is the Comptroller of Patents. (The official instructions should be consulted, and see Vol. I, pp. 179–81.) The application must be made by or on behalf of the person claiming to be the proprietor of a new or original design not previously published in the United Kingdom. The same design may be registered

in more than one class, and in case of doubt the Comptroller may decide the class.

The Comptroller may refuse to register any design, but any person aggrieved may appeal to the Board of Trade, and the Board, after hearing the applicant and the Comptroller, if required, makes an order. Agents may be employed.

The application must state the article to which the design is to be applied and, if required, must contain a statement of novelty and generally three, or in some cases four, similar drawings, photographs, tracings, &c. Where the design contains the names or representations of living persons or persons recently dead, consents must be furnished.

The Comptroller will acknowledge the receipt of the application, which he considers, and if no objection is raised, accepts. Notice of any objection is sent to the applicant, and unless within one month he applies for a hearing, he is taken to have withdrawn his application. The decision of the Comptroller is sent to the applicant in writing, who may apply within one month for a statement of the grounds of objection with a view to appeal (fee 5*s*.). Appeals must be lodged within one month.

If, owing to the default or neglect of the applicant, an application is not completed within twelve months, notice is sent to him, and if not then completed within usually fourteen days, the application is deemed to be abandoned. On the death of an applicant before registration the names of persons owning the design may be entered.

Where a design has been registered in one or more classes of goods, the application of the proprietor to register it in one or more other classes is not refused, nor the registration invalidated, on the ground of the design not being a new and original one by reason only of previous registration, or on the ground of the design having been previously published in the United Kingdom by reason only that it has been applied to goods of another class in which it was so previously registered.

The Comptroller grants a certificate of registration to the proprietor when the design is registered, and in case of loss of the original may furnish one or more copies of the certificate.

The fee on application to register one design to be applied to a single article is 5*s*. (carpets, &c., 2*s*. 6*d*.), or to be applied to a set of articles, 10*s*.; if to be applied to lace, 1*s*, or to a set of lace articles, 2*s*.

The Register of Designs is kept at the Patent Office, and in it are entered the names and addresses of proprietors, a representation or specimen of the design, notifications of assignments, and transmissions of registered designs and other matters.

The register is *prima facie* evidence of any matters directed or authorized to be entered in it.

Assignment

A person entitled as assignee, mortgagee, licensee, or otherwise may make application jointly with the registered proprietor with a new registration fee, or a person subsequently entitled may make application with proof of title and a fee of 10*s*., and the Comptroller will make the necessary entry on the register. The name of a mortgagee or licensee may be removed.

Copyright in Registered Designs

The registered proprietor of a design when it is registered has copyright in it for five years from the date of registration. Application for extension of the period may be made within one week before its expiration (fee 5*s*.), and the Comptroller on payment of a fee of £1 may extend the period of copyright for a second period of five years. Within six to twelve months of the expiration of this second period application for further extension (fee 10*s*.) may be made to the Comptroller, and on payment of a fee of £1, 10*s*. he may extend the period of copyright for a third period of five years.

Representations and Specimens

Before delivery on sale of any article to which a registered design has been applied, the proprietor, if exact representations or specimens were not furnished on the application for registration, must furnish to the Comptroller the necessary number of exact representations or specimens of the design, and on failure so to do his name will be erased from the register and the copyright cease.

The proprietor must cause each article to be marked with the word "Registered" or "Regd." or "Rd.", and in most cases with a number. He will not be entitled to recover penalties or damages in respect of infringement unless he took all proper steps to ensure the marking of the article, or the infringement took place after the guilty person knew or had received notice of the existence of the copyright in the design.

The Board of Trade may, on representation made by any trade or industry, dispense with or modify these requirements as regards any particular class or description of articles in the interests of the trade or industry.

The disclosure of a design by the proprietor to any other person in such circumstances as would make it contrary to good faith for that other person to use or publish it, or disclosure in breach

of good faith by any person other than the proprietor of the design, or acceptance of a first and confidential order for goods bearing a new and original textile design intended for registration, are not deemed publication of the design so as to invalidate the copyright if registration is obtained subsequently to the disclosure or acceptance.

Inspection of Register

During the existence of the copyright in a design, or a period usually five years, but as to printed and woven designs and unclassified goods two years, the design is not open to inspection except by the proprietor or person authorized in writing by him, or person authorized by the Comptroller or the Court, and furnishing such information as may enable the Comptroller to identify the design. A design is not open to the inspection of any person except in the presence of the Comptroller or officer acting under him, and on payment of a small fee. The person making the inspection must not take any copy. Where registration of a design is refused on the ground of identity with a design already registered, the applicant is entitled to inspect the design so registered. After the expiration of copyright or shorter prescribed period, a design is open to inspection, and copies can be taken on payment of a fee.

On the request of any person furnishing information enabling the Comptroller to identify the design and on payment of a fee of 1*s.* (2*s.* 6*d.* if the registered number is not supplied), the Comptroller must inform such person whether the registration still exists in respect of the design and as to what classes of goods, and its date and the name and address of its proprietor.

At any time after the registration of a design any person may apply to the Comptroller for the cancellation of the registration on the ground that the design is used for manufactures exclusively or mainly out of the United Kingdom. The application is a similar one to that made in respect of patents (see p. 182).

Exhibitions

The exhibition at an industrial or international exhibition certified by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor of a design, of any article to which a design is applied, or the publication during the holding of any such exhibition of a description of a design, does not prevent the design from being registered, or invalidate its registration. The exhibitor, before exhibiting or publishing a description, must give the Comptroller the prescribed notice of his intention to do so, and the application for registration must be made within six months of the date of the opening of the exhibition. This provision may be applied by Order in Council to any exhibition.

Legal Proceedings

During the existence of copyright in any design, it is not lawful for any person:

(*a*) For the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation of it, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or

(*b*) Knowing that the design or any fraudulent or obvious imitation of it has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

The penalty is the payment to the registered proprietor of a sum not exceeding £50, recoverable as a debt or damages at the suit of the proprietor, who may also obtain an injunction; but not more than £100 can be recovered in respect of one design.

The same provisions apply as to certificates of validity and remedy in case of groundless threats and legal proceedings to registered designs as in the case of patents (see p. 183).

TRADE MARKS

Introductory

The general principle underlying the law as to trade marks was well stated by Lord Justice James in his judgment in *Singer Manufacturing Company v. Loog* (1880): "No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade de-

signation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I have said, make directly, or through the medium of another person, a false representation that the goods are the goods of another person."

The law on the subject of trade marks is not older than the nineteenth century, and the bulk of it is now contained in the Trade Marks Act, 1905, and the Rules made under it by the Board of Trade, with the exception of the criminal provisions contained in the Merchandise Marks Acts. The principle of registration of trade marks was first adopted under the Act of 1875, registration then becoming *prima facie* evidence of the right to the exclusive use of a mark. The Act of 1883 directed the Register of Trade Marks to be kept at the Patent Office.

A "mark" includes any device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof.

A trade mark is defined as a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale.

The Registrar of Trade Marks

The Registrar is the Comptroller-General of Patents.

Any discretionary or other power given to the Registrar must not be exercised adversely to an applicant or registered proprietor without the applicant or registered proprietor being given an opportunity of being heard. Except where expressly given, there is no appeal from the decision of the Registrar otherwise than to the Board of Trade; but the Court in dealing with any question of rectification of the Register has power to review any decision of the Registrar relating to the matter in question.

In his yearly Report the Comptroller General must include a report respecting the execution of the Trade Marks Act.

The Register

The Register of Trade Marks is kept at the Patent Office (see Vol. I, pp. 179–81), and all registered trade marks are entered in it, with the names and addresses of their proprietors, notifications of assignments and transmissions, disclaimers, conditions, limitations, and other matters. Trusts are not entered. The Register is open to the public for inspection on payment of 1*s.* per quarter of an hour during the usual hours. Certified copies of any entry may be obtained on payment of a fee of 10*s.*, and office copies at 1*s.*, or 4*d.* per 100 words over 300.

The Board of Trade

The Board of Trade, acting by the President or a Secretary or Assistant Secretary, or any person specially authorized by the President, may refer any appeal to the Court, but otherwise the decision of the Board is final. The Board of Trade has power to make and has made rules, namely, the Trade Marks Rules, 1906, which have the force of law. Supplementary rules can be made, and are to be advertised in the Trade Marks Journal and laid before Parliament. With the sanction of the Treasury, the Board has prescribed fees.

Registrable Trade Marks

A "registrable trade mark" means a trade mark which is legally capable of registration, and a "registered trade mark" one which is actually upon the register.

A trade mark must be registered in respect of particular goods or classes of goods, and a registrable trade mark must contain or consist of at least one of the following essential particulars:—

(1) The name of a company, individual, or firm represented in a special or particular manner;

(2) The signature of the applicant for registration, or some predecessor in his business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(5) Any other distinctive mark; but a name, signature, or word or words if not of the above description is not, except by order of the Board of Trade or the Court, deemed a distinctive mark. Any special or distinctive words or letters used as a trade mark in business before August 13, 1875, and continued in use to the date of application may, however, be registered.

A trade mark may be limited wholly or in part to one or more specified colours, but if not so limited is deemed to be registered for all colours. No matter which is calculated to deceive or otherwise disentitled to legal protection, or contrary to law or morality, or of any scandalous design, can be registered.

Any application may be refused if it contains the words "Patent", "Patented", "By Royal Letters Patent", "Registered", "Registered Design", "Copyright", "Entered at Stationers' Hall", "To counterfeit this is forgery", or such-like words, or if the applications contain representations of Their Majesties or any member of the Royal Family, or the Royal Arms, arms of foreign states, of cities, corporate bodies, &c., or the representation of living persons or those recently dead, unless consents are furnished.

Any person using the Royal Arms, or crests or arms so closely resembling them as to be calculated to deceive, or the arms of any member of the Royal Family, in connection with any trade, business, calling, or profession, may be restrained from such use. The use of foreign Royal Arms must be justified.

Application for Registration

Application for registration must be made in writing by the person claiming to be the proprietor to the Registrar on the form prescribed. Agents may be employed. Upon receipt of the application the Registrar causes a search to be made amongst registered marks and pending applications, to see if there are identical or closely resembling marks already registered.

The Registrar may refuse any application, or may accept it absolutely or subject to conditions, amendments, or modifications. In case of refusal or conditional acceptance, on request of the applicant, the Registrar must state in writing the grounds of his decision, and such decision is subject to appeal to the Board of Trade or to the Court at the option of the applicant.

The Registrar must advertise every application accepted or conditionally accepted for registration in the Journal of Trade Marks, and a block must be furnished by the applicant for the purpose of illustration. Any person within one month from the date of the advertisement of an application may give notice to the Registrar of opposition to the registration, and notice being given to the applicant, the parties are informed of their statements and counter-statements, and if opposition is persisted in after hearing the evidence, the Registrar decides whether the registration is to be permitted or not. His decision is subject to appeal to the Court, or, with the consent of the parties, to the Board of Trade. The result of an appeal may be that the mark is sanctioned in a modified form, in which case it must be advertised in that form.

On registration, the Registrar grants a sealed certificate in the form prescribed. Where registration is not completed within twelve months from the date of application owing to the default of the applicant, the Registrar gives usually fourteen days' notice, and if not completed within the fourteen days, the application is treated as abandoned.

Disclaimer

If a trade mark contains parts not separately registered by the proprietor as trade marks, or if it contains matter common to the trade or otherwise of a non-distinctive character, the Registrar, Board of Trade, or the Court in deciding whether such mark shall be entered or remain upon the register may require the proprietor to disclaim any right to the exclusive use of any part or parts, to the exclusive use of which they hold him not to be entitled. But no disclaimer in the register affects the rights of any proprietor except such as arise out of the registration of the trade mark in respect of which it is made.

Effect of Registration

The person for the time being entered in the register as proprietor, subject to any rights appearing from such register to be vested in any other person, has power to assign the trade mark and give effectual receipts for any consideration.

A valid registration gives to the proprietor the exclusive right to the use of such trade mark upon or in connection with the goods for which it is registered. Where two or more persons are registered as proprietors, no rights to exclusive user, except where respective rights have been defined by the Court, are acquired by any one of them as against any other, but, otherwise, each has rights as if he were the sole registered proprietor. Registration as proprietor is *prima facie* evidence of the validity of the original registration and all subsequent assignments and transmissions. The original registration, after the expiration of seven years, is taken to be valid in all respects, unless it was obtained by fraud, or unless the trade mark is calculated to deceive, or is in other ways disentitled to legal protection; but the proprietor is not entitled to interfere with or restrain the user by any person of a similar trade mark which such person has by himself or his predecessors continuously used from a date anterior to his own user, or to object to such a person being put on the register for such similar trade mark.

No person is entitled to take proceedings or recover damages for infringement of an unregistered trade mark unless it was in use before 13 August, 1875, and has been refused registration under the Act of 1905.

In any action for infringement the Court must admit evidence of the usages of the trade in respect of the get-up of the goods and of any trade marks or get-up legitimately used in connection with such goods by other persons.

No registration interferes with any *bona fide* use by a person of his own name or place of business, or of that of any of his predecessors in business, or the use of any *bona fide* description of the character or quality of his goods.

The rights of action against any person for passing off goods as those of another person, or the remedies, are not affected by the Trade Marks Act (see p. 192).

Identical Trade Marks

Except by order of the Court, or in the case of trade marks in use before 13 August, 1875, no trade mark can be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor already on the register in respect of such goods or description of goods, or so closely resembling such a trade mark as to be calculated to deceive. In the case of rival claims to the same or closely identical trade marks in respect of some goods or description of goods, the Registrar may refuse to register any of them until the rights have been determined by the Court or settled by agreement in a manner approved by him, or on appeal by the Board of Trade. In the case of honest concurrent user or of other special circumstances, the Court may permit the registration of the same or nearly identical trade marks for the same goods or description of goods by more than one proprietor, subject to conditions.

Associated and Combined Trade Marks

If application is made for the registration of a trade mark so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant, it may be required that such trade marks shall be entered on the register as associated trade marks. This does not apply to identical trade marks, which may be registered without this condition.

If the proprietor of a mark claims to be entitled to the exclusive use of any portion of such mark separately, he may apply to register the same as separate trade marks, but each separate trade mark must satisfy the conditions required of an independent mark, except that when registered it and the trade mark of which it forms a part are deemed to be associated trade marks and entered as such. The user of the whole trade mark is not deemed a user of the trade marks so contained.

A person may claim to be the proprietor of several trade marks for the same descriptions of goods which, while resembling each other in material particulars, differ in respect of—

(*a*) Statements of the goods for which they are respectively used or proposed to be used; or (*b*) Statements of number, price, quality, or names of places; or (*c*) Other matter of a non-distinctive character which does not substantially affect the identity of the trade mark; or (*d*) colour.

In such a case the marks may be registered as a series in one registration, and are deemed to be associated trade marks.

Associated trade marks are assignable or transmissible only as a whole and not separately, but for other purposes are deemed to be registered as separate marks. Where, however, user of a registered trade mark is required to be proved, user of an associated registered trade mark, or a trade mark with conditions or alterations not substantially affecting its identity, may be accepted as equivalent.

Special Trade Marks

Where any association or person undertakes the examination of any goods in respect of origin, material, mode of manufacture, quality, accuracy, or other characteristic, and certifies the result of such examination by mark used upon or in connection with such goods, the Board of Trade may permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader, or possessed of a goodwill in connection with such examination and certifying. Such a trade mark is deemed in all respects to be a registered trade mark, and such association or person the proprietor, but the mark is transmissible or assignable only by permission of the Board of Trade.

Sheffield Marks

With respect to the Cutlers Company and the marks or devices called Sheffield marks assigned or registered by the Master, Wardens, Searchers, and Assistants of that Company, special provisions have been made. The Sheffield Register is kept by the Cutlers Company, who, on request in the prescribed manner, enter all trade marks in respect of metal goods, i.e. metal wrought, unwrought, or partly wrought, and all goods com-

posed wholly or partly of any metal. The trade marks to be entered are all those assigned by the Cutlers Company and actually used before 1 January, 1884, and not previously entered, and new marks which are allowed on application made by a person carrying on business in Hallamshire or within six miles thereof. Notices of any application and registration in the Sheffield Register must be given to the Company, who enter the mark in the Register of Trade Marks, such registration having the same effect as if the application had been made to the Registrar. Similar provisions apply to objections as where the application is made to the Registrar. Any application from any person not carrying on business within Hallamshire or within six miles thereof is notified to the Cutlers Company by the Registrar.

Cotton Marks

The chief officer of the Manchester Branch is "the Keeper of Cotton Marks", who acts under the direction of the Registrar. The applications for registration in respect of cotton goods are made to the Manchester Branch, being notified to the Registrar together with the report of the Keeper of Cotton Marks. Unless the Registrar objects, the application is advertised by the Manchester Branch, and proceeds in a similar manner to other applications. Upon registration, the Keeper of the Cotton Marks enters the mark in the duplicate Manchester Register, and such registration takes effect as if the application had been made to the Registrar. Notice of any removal or cancellation or correction is notified so that the Manchester Register may be altered. A certificate of the Keeper of the Cotton Marks has the same effect as one of the Registrar.

In every application for the registration of a cotton mark which has been used prior to the date of application, the length of time of user must be stated on the application.

In respect of cotton piece goods and cotton yarn, no mark consisting of a word or words alone, whether invented or otherwise, can now be registered, and no word or words are deemed distinctive in respect of such goods. In respect of cotton piece goods, no mark consisting of a line heading alone can be registered, and no line heading is deemed distinctive in respect of such goods. No registration of a cotton mark gives any exclusive right to the use of any word, letter, numeral, line heading, or any combination thereof.

The Keeper of the Cotton Marks will, on production of a facsimile of the mark and on payment of a fee of five shillings, issue a certified copy of the application for registration with the length of time of user, if any, and any other particulars deemed necessary.

The Keeper of the Cotton Marks consults the Trade and Merchandise Marks Committee appointed by the Manchester Chamber of Commerce upon questions of novelty or difficulty arising on application for registration.

Assignment

A registered trade mark may be assigned and transmitted only in connection with the goodwill of the business concerning the goods which have been registered, and is determinable with that goodwill; but the proprietor may assign the right to use the trade mark in any British possession, protectorate, or foreign country in connection with any goods for which it is registered, together with the goodwill of the business in such goods. The request to assign must be made jointly by both parties, or, if by a subsequent proprietor, with proof of his title as required.

Where a person ceases to carry on business by reason of dissolution of partnership or otherwise, and his goodwill does not pass to one successor but is divided, on the application of the parties interested the Registrar may permit an apportionment of the registered trade marks, subject to conditions and modifications, if necessary, in the public interest, and subject to appeal to the Board of Trade.

Period and Renewal of Registration

The registration of a trade mark is for a period of fourteen years, but on application made two to three months before the expiration of the last registration by the registered proprietor the Registrar may renew the registration of such trade mark for a further period of fourteen years. If application is not made the Registrar sends notice to the registered proprietor to the effect that the existing registration will expire, with the conditions as to the payment of fees on which renewal may be obtained. If at the expiration of the time prescribed the conditions have not been complied with, the Registrar may remove such trade mark from the register, subject to conditions as to restoration. The cause of removal is entered. Where a trade mark has been removed for the non-payment of the fee it is, for the purposes of any application for registration during one year, deemed a trade mark already registered, unless it is shown that there has been no *bona fide* trade user of such trade mark during the two years preceding such removal.

Correction and Rectification of the Register

On the request of a registered proprietor, or person entitled to act for him, the Registrar may correct any error in or make any change in the name or address of the registered proprietor of a trade mark, cancel the entry, strike out any goods or classes of goods from those for which the mark is registered, or enter a disclaimer or memorandum relating to a mark which does not in any way extend the rights given by the existing registration of such mark. Any decision of the Registrar is subject to appeal to the Board of Trade.

Where a person becomes entitled to a registered trade mark by assignment, transmission, or other operation of law, the Registrar, on request and on proof of title, must cause the name and address of such person to be entered as proprietor, subject to appeal to the Court, or, with the consent of the parties, to the Board of Trade.

The registered proprietor may apply for leave to add to or alter his trade mark in any manner not substantially affecting its identity, and against any refusal or conditional permission of the Registrar may appeal to the Board of Trade. An altered trade mark must be advertised.

The Court may order the rectification of the register in certain cases: on the application of any person aggrieved by the non-insertion in or omission from the register of any entry, or by any entry made in the register without sufficient cause, or wrongly remaining on the register, or by any error or defect in any entry. In the case of fraud, the Registrar may himself apply to the Court.

A registered trade mark may be taken off the register by the Court in respect of any goods for which it is registered on the ground that it was registered without any *bona fide* intention to use it in connection with such goods, and there has, in fact, been no such *bona fide* user; or on the ground that there has been no such *bona fide* user during the five years immediately preceding the application to remove, unless special circumstances are shown.

Scotland, Ireland, &c.

The Trade Marks Act applies to Scotland and Ireland. Subject to local jurisdiction and slightly different punishment of offences, the Act applies to the Isle of Man. The Lancaster Court of Chancery has local jurisdiction in respect of registrations in the Manchester branch, subject to the usual appeal from that Court (see Chapter XXVI of this Part).

International and Colonial Arrangements

The same arrangements can be made with regard to trade marks as may be made in respect of patents and designs (see p. 177).

Legal Proceedings

In any legal proceeding questioning the validity of registration, the Court may certify the validity of a trade mark; and if subsequently such validity comes into question in any legal proceeding, the proprietor of the trade mark, on obtaining a final order or judgment in his favour, is entitled to full costs, charges, and expenses as between solicitor and client, unless otherwise certified by the Court.

The Registrar is entitled to appear and be heard in any proceeding, but he usually submits to the Court a statement in writing, which forms part of the evidence. The costs of the Registrar are in the discretion of the Court, but he cannot be ordered to pay the costs of another party. Before the Board of Trade or the Registrar evidence is given by statutory declaration in the absence of directions to the contrary, but with the consent of the parties *viva voce* evidence may be taken.

Offences

Making or causing to be made a false entry in the register or a false copy of any such false entry, or producing or tendering in evidence such false copy, knowing it to be false, is a misdemeanour.

Any person representing a trade mark as registered which is not is liable to a fine of £5, and it is such a representation to use in connection with a trade mark the word "registered", or a similar expression.

"Passing Off" Goods

Apart from the Trade Marks Acts, it is actionable under the ordinary law to pass off goods or make representations in the conduct of a business to the effect that the goods, name, connection, mark, get-up, &c., are those of another, or such a close imitation as to be calculated to deceive. (As to trade name and goodwill, see also Chapter XVI of this Part.)

The remedy is an action for damages and injunction. An action of this kind may be brought separately from, but is often added to, one for infringement of a trade mark. Fraud is not essential. The misrepresentation is generally deliberate but it may be innocent.

Cases are common in respect of allegations as to succession to old-established businesses, use of

names the same as or similar to recognized firms or products, representations of agency, and the like. A similar style of doing business, decoration of premises, display of goods, advertisement, &c., would not, however, be actionable.

In the case of a name applied to goods or products, it is a question whether the name is a distinction of special goods or merely a name common to the class. "Kodak" is a special name, "Linoleum" is not; but even a descriptive name may come to have a special meaning. "Yorkshire Relish" means the manufacture of a particular person, who was held entitled to an injunction to prevent others from using the words without clearly distinguishing their sauce from that of the plaintiff—*Powell v. Birmingham Brewery Company* (1897). A person is not entitled to pass off his goods as the goods of another trader by selling them under a name which, immediately or ultimately, is likely to deceive purchasers into the belief that they are buying the goods of another trader, though in its primary meaning the name is merely descriptive. It was, for example, decided that "Camel Hair Belting" had come to mean the plaintiff's belting and nothing else—*Reddaway v. Banham* (1896).

The Offence of False Marking

It was always an offence at common law to obtain money by falsely pretending that goods were different from what they were. The first Merchandise Marks Act was that of 1862, but later Acts, the most important that of 1887, were passed after Britain had acceded to the International Convention of 1883 for the Protection of Industrial Property. All goods illegally bearing a trade mark or trade name may be seized on importation into the State where the mark is protected, on the request of the Government department or the party interested.

By an Act of 1911, additional power is given to the Commissioners of Customs and Excise for dealing with imported goods bearing fraudulent names or trade marks. Upon representation by any manufacturer, dealer, or trader in the United Kingdom, that goods if imported would be liable to forfeiture as infringing his name or trade mark, if the Commissioners are satisfied of the fraudulent use, they may require the importer or his agent to produce any documents in his possession, and give the name and address of the consignor and consignee of the goods. If the importer or agent fails to comply within fourteen days he is liable to a penalty of £100. Information so obtained may be communicated to the person whose name or trade mark is affected.

Offences as to Trade Marks and Trade Descriptions

It is an offence, unless a person proves that he acted without intent to defraud, to forge any trade mark, or falsely apply to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or to make any die, block, machine, or other instrument for the purpose of forging a trade mark, or to dispose of, or to have in possession any such die, block, machine, or other instrument, or to apply any false trade description to goods, or to cause any of these things to be done.

Trade Marks and Trade Description

Trade mark includes any trade mark registered under the British Acts, and any trade mark protected in any British possession or foreign state with which a convention is in force. The expression trade description means any description, statement, or other indication, including the customs entry, as to number, quantity, &c., place of origin, mode of manufacture or producing, material, patent, privilege, or copyright, and the use of any indication customary in a trade.

The offence of applying a false trade description to goods covers the application to goods of any figures, words, marks, &c., whether including a trade mark or not, which are reasonably calculated to deceive, and also the application of any false name or initials of a person as if they were a trade description; false name or initials in this sense meaning any name or initials of a person which are not a trade mark or part of a trade mark, and are identical with or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description not having authorized their use, and are either those of a fictitious person or of some person not *bona fide* carrying on business in such goods.

To a trade description lawfully and generally applied to goods of a particular class or manufactured by a particular method to indicate their class or manufacture, the provisions as to false trade descriptions do not apply, provided that the trade description does not use the name of a place or country so as to be calculated to mislead as to the place where the goods are made or produced.

Special provisions apply to watches.

Forging a Trade Mark

A person forges a trade mark who either without the assent of the proprietor makes a trade mark or mark so nearly resembling that trade

mark as to be calculated to deceive, or falsifies any genuine trade mark by alteration, addition, effacement, or otherwise. The onus of proving the assent of the proprietor is upon the defendant.

A person applies a trade mark or mark or trade description to goods who applies it to the goods themselves or to any cover, label, reel, &c., in which the goods are sold or exposed or had in possession for trade purposes, or places, encloses, or annexes any such goods in, with, or to any cover, label, reel, &c., to which a trade mark or description has been applied, or uses a trade mark, mark, or trade description in any manner calculated to lead to the belief that such goods are designated or described by such mark or description. A person is deemed to apply a mark falsely if he applies it or a near resemblance of it without the proprietor's assent, and he must himself prove the assent.

Every person who sells, or exposes, or has in his possession for sale, for any purpose of trade or manufacture, goods or things to which a forged trade mark or false trade description is applied, or to which any trade mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, is guilty of an offence, unless he proves reasonable precautions taken and absence of reason to suspect, and that on the demand of the prosecutor he gave all information in his power and otherwise acted innocently.

Persons employed in the ordinary way of business to make any die, block, machine, or other instrument are exempt from the penalties in connection with false marks if they are able to prove employment in the ordinary course on behalf of other persons resident in the United Kingdom, and that they were not interested in the goods by way of profit or commission on the sale, that they took reasonable precautions against committing an offence, and had no reason to suspect the genuineness of the mark or description, and that they gave all the information in their power to the prosecutor; but they are liable to pay the costs of the prosecutor, unless they give due notice that they rely upon this defence.

There is a penalty of £20 for falsely representing that goods are made by a person holding a Royal Warrant or for the service of the King, Royal Family, or Government Department.

Any person guilty of an offence is liable on indictment to imprisonment for two years or to a fine, or both, or on summary conviction to imprisonment, and in either case to fine and forfeiture of the goods. Prosecutions must be taken within three years of the offence or one year after its first discovery, whichever happens first.

Accessories may be punished as principals. A search warrant may be granted; and official prosecutions may be instituted by the Board of Trade and the Board of Agriculture.

Implied Warranty on Sale of Marked Goods

On the sale or in the contract of sale of any goods to which a trade mark, mark, or trade description has been applied, the vendor is deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description unless the contrary is expressed in writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Prohibited Importation

There is a prohibition on the importation of certain goods which if sold would be liable to forfeiture, namely, all such goods and all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom unless accompanied by a definite indication of the country of origin. The Commissioners of Customs have power to detain such goods and make regulations in respect of them.

Marking of Special Goods

Apart from the Merchandise Marks Act, under special Statutes certain articles require special marking. Most of these requirements have been already noticed in Part I, Chapter XIII, and relate to anchors and chain cables, bread, butter and margarine, metal buttons, playing cards, chicory and coffee imitations, clocks (if bearing the implication of manufacture in the United Kingdom they are not to be imported), plate and plated goods, gunpowder, hops, linen (counterfeit marks are penalized), exhibition medals (false representations are penalized), public stores, weights and measures (see Part III, Chapter VI), tobacco, yarn (penalties are provided for reeling short lengths).

AUTHORITIES.—*Edmunds*, *Fulton*, *Gordon*, *Roberts*, *Terrell*, on "Patents and Designs"; *W. Martin*, "English Patent System"; *Kerly* on "Trade Marks"; *Sebastian* on "Trade Marks".

CHAPTER XV

COPYRIGHT

Introductory—Literary, Dramatic, Musical, and Artistic Copyright—Right to Title—Newspapers—Musical Piracy—Mechanical Instruments—Colonial Copyright—International Copyright—Publishers and Authors—Agents.

INTRODUCTORY.

Copyright is a subject on which the legislature has been dilatory in discharging its duty. The report of a Royal Commission of 1878 long lay unheeded. No private member was found prepared to undertake the task, probably convinced that a private member's legislative efforts would be in vain. Times have changed since Mr. Serjeant Talfourd and Lord Mahon, assisted by the invaluable criticisms of Macaulay, secured the passing of the Copyright Act, 1842, which was for so long the law. At length in 1911 a comprehensive measure passed through Parliament, coming into force on July 1, 1912.

It was not so long ago that persons of distinction pretended to look upon profits derived from literary labour with contempt. Sir Thomas Scrutton is justly facetious over the mock heroics of Lord Camden in *Donaldson v. Beckett* (1774), when he said: "It was not for gain that Bacon, Newton, Milton, and Locke instructed the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letterpress. When the bookseller offered Milton five pounds for his *Paradise Lost* he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as a reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it."

The Act of 1842, under Macaulay's inspiration, provided for the alternative periods of forty-two years from publication, and seven years from the death of the author, whichever period should be the longer. Dramatic and musical copyright, and copyright in lectures and engravings, works of fine art, and sculpture were separately treated. Now the new Act treats copyright as a whole, and extends the period.

Copyright has been the subject of legislation in Canada and Australia and other Dominions. International Copyright depends upon the International Convention, and the Copyright Union embraces most of the important countries of Europe, with Japan. With the United States of America special conditions have been arranged.

LITERARY, DRAMATIC, MUSICAL, AND ARTISTIC COPYRIGHT

In unpublished matter the author had a common law right which enabled him to restrain publication by anyone else, and even an innocent infringement of his rights. The writer of a letter retains the right of reproduction. In 1741 the poet Pope was able to obtain an injunction restraining the bookseller Curl from publishing Pope's letters to him, but not his letters to Pope—*Pope v. Curl* (1741). The subject of the celebrated Letters of Lord Chesterfield came before the Courts in 1774, when it was decided that the right in unpublished letters was not in the person to whom they had been sold by his son's widow, but in the executors of Lord Chesterfield as representing the writer, who could restrain publication—*Thompson v. Stanhope* (1774). But although this

was so as a right of property, the copyright in a letter published after the writer's death was vested in the owner of the actual sheets of paper, as was held in the case of some unpublished letters.

Copyright subsists throughout the parts of His Majesty's Dominions to which the Act is extended, in the case of a published work, if first published within such parts of His Majesty's Dominions, and in the case of an unpublished work, if the author was at the date of making it a British subject or a resident within these parts. Copyright beyond this only subsists in accordance with Orders in Council made in respect of self-governing Dominions and foreign countries.

Copyright means the sole right to produce or reproduce the work or any substantial part in any material form whatsoever and in any language; to perform, or in the case of a lecture to deliver, the work or any substantial part in public; and if the work is unpublished, to publish the work. Copyright includes the sole right—

(*a*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(*b*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(*c*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

(*d*) to produce, reproduce, perform, or publish any translation;

and to authorize any such acts.

Publication means the issue of copies to the public. It does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition of an artistic work, or the construction of an architectural work of art. In this connection the issue of photographs and engravings of works of sculpture and architectural works is not publication of such works.

Essentials of Copyright

In order to be the subject of copyright, and be entitled to protection, the matter must have some original quality and literary value, either in composition or arrangement. The reporter who makes his notes of a political speech delivered in public, transcribes them, and publishes in a newspaper a verbatim report, is the "author", and entitled to the copyright—*Walter v. Lane* (1900). A trades directory composed under headings, with some skill and originality in the arrangement, is entitled to copyright, and another publisher will be restrained from using the information for the purpose of compiling another book. Those who have been employed to canvass for information are not at liberty to use that information for a rival publication; but this is part of the general law, that no right can be acquired by a servant or agent against his employer or principal. A printer employed to print, or a photographer paid for a sitting, acquires no right of reproduction.

A publication consisting of matter copied from public sources of information, unless there is some variation in the matter and skill in the presentation and arrangement, will not acquire copyright.

If there has been an illegitimate use of another publication it is immaterial that the source of information is acknowledged. Honest intention in the borrower will not be a sufficient compensation to an author for having the prime fruits of his labour extracted and presented in a cheaper form by another. Regard must be had to the quantity and nature of the information taken and republished, and whether or not there has been a genuine exercise of independent labour and thought. Sometimes a good deal may be taken if a good deal of labour is bestowed upon it, and it is presented in practically a new form.

But a new directory must not be compiled by the use of slips made from an old one; railway timetables may be common sources of information, but if they are arranged, with a feature specially written up dealing with circular tours, the latter may be copyright. Biographical notes of golf players, made up from enquiries and incorporated into a directory, are copyright.

A list of names may be so arranged as to be capable of copyright. There is copyright in an illustrated catalogue of articles of furniture, as it is not necessary that an article should be for sale to obtain copyright. The purpose of publication is immaterial—*Maple v. Junior Army and Navy Stores* (1882).

There may be copyright in original selection, arrangement, and compilation, and additions and annotations to a classic. If a classic is reprinted, the original, and not a modern copyright edition, must be used to work upon. There is obviously copyright in a translation. A reprint of a work of which the copyright has expired, with notes and illustrations, creates a new copyright. It is protected from piracy if the new matter is of any importance—*Black v. Murray* (1870). When a popular work first goes out of copyright, it is only the first edition which can be reproduced. Subsequent editions, if with any later variations and additions of the author, remain the copyright of the proprietor for such further time as may be—often an important matter to the publishing trade

and the book buyer, in the case of the works of such authors as Tennyson and Ruskin.

Infringement

Copyright is infringed if any person, without the consent of the owner of the copyright, does anything the sole right to do which is conferred on the owner of the copyright; but certain specific acts do not constitute an infringement, viz.:—

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:

(ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:

(iii) The making or publishing of paintings, drawings, &c., of artistic works permanently situated in a public place, or any architectural work of art:

(iv) The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published copyright works not themselves schoolbooks: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

(v) The publication in a newspaper of a report of a lecture delivered in public unless specially prohibited:

(vi) The reading or recitation in public by one person of any reasonable extract from any published work.

Copyright in a work is infringed if any person sells or lets for hire, or by way of trade exposes or offers for sale or hire, or distributes to such an extent as to affect prejudicially the owner of the copyright, or exhibits by way of trade in public, or imports for sale or hire, any work which to his knowledge infringes copyright.

Copyright is also infringed if any person for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement.

What is an infringement depends upon the circumstances of each particular case, the nature of the work and the extent to which it is borrowed from. Infringement may take place in three ways: by open piracy, by literary larceny, and by fraud. Piracy is by an unauthorized reprint in whole or part, or by importing such unauthorized reprint from a foreign country. It is piracy in respect of a subsisting copyright to print it or cause it to be printed without the consent in writing of the proprietor; to import for sale or hire copies unlawfully printed abroad, or sell or publish or have in possession for sale copies known to have been unlawfully printed or imported. Larceny is the appropriation of the literary work of another by undue borrowing; fraud is selling or attempting to pass off another work under colour of its being a copyright work of known value and reputation.

Term of Copyright

The term for which copyright subsists, except where otherwise expressly provided, is the life of the author and fifty years after his death.

At any time after the expiration of twenty-five years, or thirty years in the case of a work in which copyright subsisted at the passing of the Act, from the death of the author of a published work, copyright in the work is not infringed by reproduction for sale if the person reproducing proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid to or for the benefit of the owner of the copyright royalties in respect of all copies of the work sold by him at the rate of 10 per cent on the price at which he published. The Board of Trade may make regulations as to the mode in which notices are to be given and royalties paid.

Copyright Existing at the Time of the Act

Persons who were entitled to any copyright at the commencement of the Act, in the case of works other than dramatic and musical works, have now copyright as defined by the Act. In the case of dramatic and musical works both copyright and performing right are according to the Act, but owners of copyright and not performing right have copyright as defined by the Act, except the sole right to perform the work or any substantial part of it in public. Owners of performing right and not copyright have the sole right of performing the work in public, but none of the other rights comprised in copyright as defined by the Act. There are certain reservations in cases where there has been an assignment, and where expenditure or

liability in connection with reproduction or performance has been incurred under the old law.

Compulsory Licences

Any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, complaint may be made to the Judicial Committee of the Privy Council that the owner of the copyright has refused to republish or allow republication or performance, and that by reason of such refusal the work is withheld from the public. The owner of the copyright may then be ordered to grant a licence to reproduce or perform the work in public on terms.

Owner of Copyright

The author of a work is presumed to be the first owner of the copyright; but

(*a*) where in the case of an engraving, photograph, or portrait the plate or other original was ordered by some other person and made for valuable consideration, in the absence of any agreement to the contrary, the person giving the order is the first owner of the copyright; and

(*b*) Where the author was in the employment of some other person, and made the work in the course of his employment, the employer is the first owner of the copyright.

Assignment

The owner may assign the right wholly or partially, generally or subject to limitations, for the whole term or any part, and grant any interest by licence, but any such assignment or grant must be in writing, signed by the owner or his duly authorized agent.

Where the author of a work is the first owner of the copyright, no assignment or grant otherwise than by will, after the passing of the Act, vests in the assignee or grantee any rights beyond the expiration of twenty-five years from the death of the author. The reversionary interest in the copyright on the termination of that period devolves on the death of the author on his legal personal representatives as part of his estate, notwithstanding any agreement entered into by him, but this does not apply to the assignment of the copyright in any collective work or licence to publish a work as part of a collective work. A collective work means an encyclopædia, dictionary, &c., newspaper, review, magazine or periodical, or any work written in distinct parts by different authors.

Where the proprietor of an encyclopædia employs and pays other persons to compose articles for publication in it, the question whether the copyright in the articles belongs to the proprietors or to the author is an inference of fact to be drawn by a reasonable man from the nature of the contract and all the circumstances. The contract need not be in writing, and no express words need be used. The inference that the copyright was intended to be in the proprietor may fairly be drawn when there are no special circumstances, and the only material facts are the employment and the payment—*Lawrence & Bullen v. Affalo* (1904).

Remedies for Infringement

The owner of copyright in the case of infringement is as a general rule entitled to remedies by way of injunction or interdict, damages, accounts, and otherwise. In any action for infringement, the work is presumed to be a work in which copyright subsists and the plaintiff to be the owner, unless the defendant puts in issue the existence of the copyright or the plaintiff's title. Where the question is put in issue there is a presumption that the person whose name is printed or indicated as author is the author of the work. If no name is printed or indicated, or if the name printed is not the author's true name, and there is a publisher's name upon the work, unless the contrary is proved, such publisher is presumed to be the owner of the copyright.

All infringing copies, and all plates used in their production are deemed to be the property of the owner of the copyright, and he may take proceedings for their recovery.

Where in any proceedings the defendant alleges that he was not aware, and is able to prove so, and that he had not reasonable means of making himself aware of the existence of the copyright, the plaintiff is only entitled to remedy by an injunction or interdict. In the case of an architectural infringement, where a building has been actually commenced, the owner of the copyright is not entitled to an injunction or interdict to restrain the construction or order demolition.

Actions must be commenced within three years.

Summary Remedies in United Kingdom

If any person knowingly—

(*a*) makes for sale or hire any infringing copy of a work in which copyright subsists; or

(*b*) sells or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work; or

(*c*) distributes infringing copies of any such work

either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*d*) by way of trade exhibits in public any infringing copy of any such work; or

(*e*) imports for sale or hire into the United Kingdom any infringing copy of any such work:

he is liable to a fine of 40*s.* for every copy, not exceeding £50 in respect of the same transaction, and for any second or subsequent offence either to a fine or imprisonment.

A person knowingly making or having in possession any plate for making infringing copies, or for private profit causing any work to be performed in public without the consent of the owner, is liable to a fine of £50, and for any second or subsequent offence to a fine and imprisonment.

The Court may order all copies of the work and all plates to be destroyed or delivered up to the owner of the copyright. There is a right of appeal to Quarter Sessions. (See also Musical Piracy, p. 200.)

Importation of Copies

Copies made out of the United Kingdom of any copyright work as to which the owner of the copyright gives notice in writing to the Commissioners of Customs and Excise that he is desirous that such copies should not be imported into the United Kingdom, are not to be imported, and such copies are included in the list of prohibited goods to which the Customs Act applies.

Free Copies to Libraries

The publisher of every book, pamphlet, sheet of music, map, chart or table, separately published, must within one month of publication deliver at his own expense a copy of the book to the British Museum. If written demand is made within twelve months after publication, he must deliver within one month, to some depot in London, a copy of the book for the Bodleian Library, Oxford; the University Library, Cambridge; the Library of the Faculty of Advocates, Edinburgh; and the Library of Trinity College, Dublin; and, in the case of certain books specified by regulations, the National Library of Wales.

The copy to the British Museum must be one of the best edition of the book; the others need only be of the edition of which most copies are offered for sale. A second or subsequent edition of a book need not be sent unless it contains additions or alterations; and in the case of an encyclopædia, newspaper, review, magazine, or other serial, a single claim for the whole work is sufficient.

A publisher who fails to comply with these requirements is liable to a fine of £5 and the value of the book.

Joint Authors

Copyright in a work of joint authorship subsists during the life of the author who first dies and fifty years after his death, or during the life of the author who dies last, whichever period is the longer.

Posthumous Works

In the case of a literary, dramatic, or musical work, or an engraving, in which copyright subsists at the death of the author, or, in the case of joint authorship at the death of the author who dies last, which has not been published or performed or delivered in public before that date, copyright subsists till publication, performance, or delivery, and for fifty years afterwards. Ownership of the manuscript of an unpublished or unperformed work of a deceased author acquired by his will is *prima facie* proof of the ownership of the copyright.

Crown Copyright, &c.

The Crown has, not unquestioned, rights of property in the Authorized Version of the Bible, the Book of Common Prayer, and in Scotland also in the Psalm Book, Confession of Faith, and the Catechisms, and in Acts of Parliament. The Bible and the Book of Common Prayer are solely printed and published by the Oxford and Cambridge Presses and the King's Printer. As regards the Bible and Acts of Parliament, anyone is permitted to print editions with notes. Copyright in any work prepared or published by or under the direction or control of His Majesty or any Government Department is, subject to any agreement with the author, in the Crown for fifty years from the date of the first publication. In any Government and official publications the Crown does not enforce its rights except where an intimation is printed thereon that Crown copyright is reserved.

The Universities of Oxford and Cambridge, St. Andrews, Glasgow, Aberdeen, and Edinburgh, and the Colleges of Eton, Westminster, and Winchester have perpetual copyright in works bequeathed to them.

Photographs

Copyright subsists in photographs for fifty years from the making of the original negative, and the owner of the original negative at the time when made is deemed to be the author.

Designs

Copyright does not apply to designs capable of being registered under the Patents and Designs Act, 1907 (see Chapter XIV of this Part), except designs which are not used or intended to be used as models or patterns to be multiplied by any industrial process.

RIGHT TO TITLE

There is no right to a title either of a newspaper or other publication. This was decided in *Dicks v. Yates* (1881), a case which has often been followed. There is a right to restrain a person from using a title so as to pass off his publication as that of another. This is due to the ordinary rule of law against misrepresentation. If the use of a name as the title of a newspaper or a book is reasonably calculated to induce the public to believe that it represents something else, and that the proprietor is seeking to pass his off as the original publication, the use of the name will be restrained—*Walter v. Emmott* (1885). It must be shown that the new publication under the same name is calculated to deceive the public, and that there is a probability of the old publication being injured by such deception.

NEWSPAPERS

Newspapers are the subject of copyright as "books". The need for registration of copyright before action no longer obtains. To sue in respect of the infringement of any article, the proprietor must show that the article was written by a person employed by him in the course of his employment.

As we have seen, no exclusive right to title can be obtained; but an established title can be protected against misrepresentation.

Under the Newspaper Libel and Registration Act, 1881, printers and publishers of every newspaper must make an annual return in July, containing the title of the newspaper, and the names and occupations, business and residential addresses, of proprietors. The Registry is in England at Somerset House. This was apart from registration as "a book" to preserve the copyright.

Every newspaper or book intended to be published or dispersed must have the name and address of the printer upon the first or last page; and the printer for profit of every paper (other than bills, deeds, &c.) must keep at least one copy, and write or print thereon the name and address of his employer.

There is copyright in the form in which news is presented, if not in the news itself; a practice of newspapers to copy from each other is no defence to a copyright action—*Walter v. Steinkopff* (1892). In two cases respecting information supplied by tape machines or other means of news communication to subscribers, it was shown that "news" could be protected from communication to non-subscribers—*Exchange Telegraph Company v. Gregory* (1896); *Exchange Telegraph Company v. Central News* (1897).

MUSICAL PIRACY

Under the Musical Copyright Act, 1902, the police were authorized to seize, under order from a magistrate, or on request of the owner of the copyright, pirated copies, and their destruction on delivery up might be ordered by a magistrate. But as it was decided (*ex parte Francis*, 1903) that service of a summons on a hawker or other vendor was an essential preliminary, the Act became a dead letter. The Musical Copyright Act, 1906, contains stronger powers. Every person who prints, reproduces, or sells, or exposes, offers, or has in his possession for sale, any pirated copies of any musical work, or plates for printing pirated copies, unless he proves he acted innocently, is guilty of an offence, and can be fined £5, and on a second offence £10 or be imprisoned for two months. A constable may take into custody without warrant any person who sells, exposes, offers, or has in his possession for sale any pirated copies of any such music as may be specified in any general written authority addressed to the chief of police, and signed by the apparent owner of the copyright or his agent, requesting the arrest, at the risk of such owner, of all offenders against the Act. A search warrant may be granted as to suspected premises.

The police cannot seize and order the destruction of perforated music rolls, made for use with a mechanical instrument, as pirated "music"—*Mabe v. Connor* (1909).

MECHANICAL INSTRUMENTS

Copyright subsists in records, perforated rolls, and other contrivances for mechanically reproducing sounds in the same manner as if such contrivances were musical works; and the term of copyright is fifty years from the making of the original plate. The owner of such original plate at the time when it was made is presumed to be the author.

It is not an infringement of copyright in any musical work for any person to make records, perforated rolls, or other contrivances by means of which the work can be mechanically performed, if such person proves—

(*a*) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(*b*) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to or for the benefit of the owner of the copyright in the work royalties in respect of all such contrivances sold by him. Nothing in this provision authorizes any alterations in or omissions from the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by or with the consent or acquiescence of the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and for the purposes of this provision a musical work is deemed to include any words so closely associated therewith as to form part of the same work, but not a contrivance by means of which sounds may be mechanically reproduced.

The rates at which royalties are to be calculated are

(*a*) in the case of a contrivance sold within two years after the commencement of the Act by the person making the same, 2½ per cent; and

(*b*) in the case of contrivances sold as aforesaid after the expiration of that period, 5 per cent

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall in no case be less than a halfpenny for each separate musical work in which copyright subsists reproduced thereon, and where it includes a fraction of a farthing such fraction of a farthing shall be reckoned as a farthing.

The rate may be revised by the Board of Trade any time after June, 1919, upon holding a public enquiry, as may seem just in the circumstances, and the Board of Trade may prescribe the mode in which notices and particulars are to be given and payments made. Provision is made for the apportionment of compensation amongst two or more parties entitled to copyright.

In the case of musical works published before the commencement of the Act, the conditions as to the previous making by or with the consent or acquiescence of the owner of the copyright and restrictions as to alterations in the work do not apply, and the rate of royalty is 2½ instead of 5 per cent, and nothing on contrivances sold before July 1, 1913, if contrivances for producing the same work were lawfully made before the passing of the Act.

Where a record, perforated roll, or other contrivance for mechanically reproducing sound has been made before the commencement of the Act, copyright as from the commencement of the Act subsists in it as if the Act had been in force at the time of making, but the owner of the original plate at that time is the first owner of the copyright, and copyright is not conferred if the making would have infringed copyright in some other such contrivance under the terms of the Act.

COLONIAL COPYRIGHT

The Copyright Act, except where especially restricted, extends throughout His Majesty's Dominions, but not to a self-governing Dominion unless declared by the legislature of that Dominion to be in force there.

The Act may by Order in Council be extended to any protectorate of the Crown.

Under the provisions of the Act of 1847 it was provided that by Order in Council the legislation against the importation and sale of foreign reprints of copyright books in any colony might be suspended if in that colony there were provisions for protecting the rights of British authors. This provision, however, proved a "complete failure", as the amounts remitted to British authors in respect of Colonial copyrights were small in-

deed. Canada presented special difficulties, owing to the handiness of the American reprints. An Act of 1875 enabled the Crown to give assent to the Canadian Copyright Act, but the question remained a vexed one till the Canada Act of 1900 conditionally prohibited the importation of pirated British editions, when an edition of the book had been licensed for reproduction in Canada.

Canadian law provides a law of copyright applicable to literary and artistic works published in Canada by authors domiciled there or in any part of the British Dominions, or by citizens of any country having an international copyright treaty with the United Kingdom, which includes Canada. Copyright may be obtained in Canada for at least twenty-eight years. Colonial reprints are not to be imported into the United Kingdom. Similar law prevails in Newfoundland.

The States of the Australian Commonwealth had legislation on copyright on the lines of the British law, and the Commonwealth Act of 1905 (proclaimed by the Governor-General in 1907) gives a general literary and artistic copyright for forty-two years, or for the author's life and seven years, to Australian works. The South African law is similar. The Indian Acts follow the British law, with requirements as to local registration. But imperial copyright remains a question still to be placed on a firm basis.

INTERNATIONAL COPYRIGHT

International copyright depends upon the provisions of the Copyright Act, and upon the Berne Convention, 1887, modified by the "Additional Act of Paris", 1896, and the Berlin Convention, 1908. The Copyright Act may by Order in Council be applied to works first published in a foreign country, and to literary, dramatic, musical, and artistic works the authors of which were at the time of the making of the work foreigners, and in respect of residence in a foreign country.

The Copyright Union comprises Great Britain, Germany, France, Belgium, Spain, Portugal, Italy, Switzerland, Denmark, Norway, Sweden, Luxemburg, Monaco, Liberia, Tunis, Hayti, and Japan. Some countries make certain reservations. There is a separate convention between Austria and Hungary and the United Kingdom.

The Berlin Convention contains full provisions as to copyright in the Union for "literary and artistic works", including translations and adaptations, dramatic, musical, architectural, and photographic works.

Authors who are subjects or citizens of any of the countries of the Union enjoy in countries other than the country of origin of the work for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives, as well as the rights specially granted by the Convention, without any formality or protection in the country of origin. The right does not apply to a representation, performance, exhibition, or construction of an architectural work.

Authors not subjects or citizens of a country in the Union first publishing their works there enjoy the same rights as natives.

The general term of copyright extends for fifty years after the author's death, unless the period is by the law of a particular country otherwise.

Serial stories and other articles in newspapers must not be reproduced without the author's consent, but ordinary news articles may be reproduced by another newspaper (unless prohibited) if the source is acknowledged.

The Convention applies to the public reproduction or performance of dramatic or musical works, whether published or not. Unauthorized appropriations, adaptations, or transformations are unlawful.

Pirated works or imported reproductions may be seized by a competent authority in any Union country.

An International Copyright office is maintained by joint contribution under the Swiss Government, and the Director issues an annual report.

Copyright in the United States of America

Copyright relations with the United States of America, owing to the common language, naturally far outweigh in importance those with any other foreign country. The ease with which British works could be produced in America long caused acute differences. British authors were, however, granted copyright in the United States under the Chace Act of 1891, i.e. for an original term of twenty-eight years, and an additional term of fourteen years if the author was living or if he had died leaving dependents. Two copies of the book, photograph, &c., had to be sent to the Librarian of Congress at Washington, and as these had to be "printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States, or from

transfers made therefrom", simultaneous publication in the United Kingdom and in the United States became necessary in order to secure copyright.

The Code of 1909 gives copyright for twenty-eight years from the first publication, and a further period of twenty-eight years if the author is living at the end of the first period, or to his wife and children, his executors or next of kin, if he is dead.

Foreigners can secure copyright only when domiciled in the United States of America at the time of first publication, or when there is reciprocal copyright between the United States of America and the State of the author. The provisions in favour of American production are extended, and also apply to the production of any illustration published with a book; but books produced in some language other than English can be protected; and provisional copyright for thirty days can be obtained in books published abroad in the English language as a preliminary to steps being taken for full protection of them under American law.

PUBLISHERS AND AUTHORS

In connection with copyright it may be permissible to say a few words on the business relations between publishers and authors, apart from the ownership of the copyright, which, as we have seen, does not pass to the publisher unless there is an agreement to that effect. It is necessary for the publisher to understand the laws relating to copyright as part of his business; but it may often happen that the author is entirely ignorant of them. Perhaps if authors in the first instance appreciated that the publication of the work of an unknown writer is one of the most speculative undertakings, they would see that it is not unreasonable that publishers should reap a considerable profit on those ventures which have been successful. But the terms of publication vary so considerably that anyone who is ignorant of what is necessary, from the standpoint of writing the book on the one hand and placing it in the hands of the reader on the other, must often pay heavily for his experience. Should an author have produced a really selling book, he may entirely lose control over the publication to which he has given his name, but from which he derives no profit, while it is still being sold for the profit of someone else. No one with any reputation to preserve should enter into any publishing contract with a firm whose general standing is not vouched for, and in making any contract he should look ahead.

People who publish a book for the first time have usually an inordinate opinion of their own production, and while wildly expectant of results may rush into a transaction which has only remote possibilities of repayment in any event. It is not unreasonable that they should pay for its production, as it is unlikely that anyone else will be found to share their delight, but they should well consider the terms on which they pay. It is probable that a new author will publish on commission, in which case the publisher accepts the ordinary relationship of agent. It may be, however, that a first work of exceptional merit presented by an author is bought outright by a publisher of discernment for a small sum, which the author is only too glad to take to secure publication and save himself the initial expense. Such an arrangement may be fair, even should the work prove a considerable success, for the publisher will be assisting in making a name for the author. An author entering into such agreement should be careful, however, not to pledge himself in regard to any future work, and should, if possible, reserve some rights in the present.

Methods of Publishing

The usual methods of publication are: (1) Purchase outright; (2) publication on a profit-sharing basis; (3) publication on a royalty agreement; and (4) publication on commission.

Purchase outright will generally apply only in the case of an author very well known who is able to command his own price, or of an author not known at all when a publisher is found prepared to venture a small sum.

Contributors to serials and encyclopædias are generally remunerated at so much for their articles, and do not share in the publishing project at all. Where articles are sent to reviews and periodicals, unsolicited, the editor is not responsible for their return, though if a stamped addressed envelope is enclosed they will generally be returned. Copies should always be kept, though the right to demand the return of MSS. still in the possession of an editor under such circumstances is clear. Even though a notice is inserted in the periodical to the effect that on no account will the editor be responsible for the return of unsolicited MSS., he would be responsible for his gross negligence in regard to the property of anyone who had not seen the notice. Where articles are solicited, the editor is responsible for their safe custody and return if not used.

Publication on a profit-sharing basis may be

a good one if the agreement is fairly carried out by the publisher; but it may be, if the success of the book is not instantaneous, that the publisher will relax his efforts and content himself with covering his cost of outlay. In any such agreement it should be stipulated how and what costs are to be charged, and how they are to be entered against the book, and that the publisher will effectively advertise the book and push its sale.

Publication on a royalty agreement is a very common one and easily adjusted, if carried out *bona fide*. The royalty is usually so much upon the published price of each volume sold. It is a satisfactory method to be adopted by an author who may look for a steady sale for his works, as he is not troubled with any of the business of production and publication, and he may receive a regular sum for several years thereby. He may reserve to himself, however, the right to be consulted as to the form, price, and production of the book, and he should only enter into an agreement for an edition of so many copies, reserving to himself control over subsequent editions, or giving the right of further editions to the publisher on terms then arranged.

Publication on commission should be provided for under an agreement setting out all the terms and the expenses which the publisher is to charge against the author, together with his commission for selling. For anything beyond these agreed terms the publisher will be obliged to seek the instructions of the author. The author will receive an estimate of cost of production, which will include not only the printing and paper and the binding of the book, and the cost of illustrations, if any, but a reasonable allowance for advertising, into the expenditure of which he should enquire. A publisher should not charge for warehousing within a reasonable time of publication.

An author who is prepared to pay commission should not accept the first estimate given. If the production of the book is undertaken at what are practically cost prices, 15 per cent is a reasonable commission, and it should be arranged that commission covers all the publisher's exertions.

Whether the agreement be on a royalty, profit-sharing, or commission basis it should reserve the author's right to inspect the publisher's books.

Although in the absence of any agreement copyright remains in the author, yet this matter should always be clearly set out, as disputes often arise, especially when publishers or others employed by them have done some work on a book, or when a book has gone to subsequent editions.

It is reasonable for an author to agree to special terms with regard to any copies sold abroad, and to sanction any provision by which the publisher allows usual and special trade discounts, or makes allowances in consideration of special markets. The American market is a very important consideration for anyone publishing a book in Britain.

An agreement to publish a book already written requires an *ad valorem* stamp, but a sixpenny stamp is sufficient if the book is "about to be written".

It may be part of a publishing agreement that an author should not write elsewhere on the same subject, but in the absence of such an unusual undertaking he is free to write elsewhere, so long as he does not infringe the copyright in what he has already sold. This is a restriction sometimes overlooked by writers whose contributions are solicited on the ground of their expert knowledge.

Again, in the absence of any agreement, there is nothing to prevent an author from writing a continuation of a book or a sequel to a story.

AGENTS

It has long been common for musical and dramatic agents to act as intermediaries between the artist and the business management. Later the literary agent has come upon the field. This agent, like any other class of agent, acts in accordance with the agreement employing him, but care should be taken, in entering into the agreement, especially not to make any unguarded committals as to future engagements or work. A commission is sometimes agreed to be paid to the agent on all engagements, whether secured by him or not, and an author is sometimes asked to agree to a commission on all his future work. The advantages may or may not justify such an arrangement, but it should be accepted with great caution. An agent may be engaged simply to secure an engagement or publication, or he may act in all the business relations of the artist or author.

A literary agent is probably most useful to an established author, whose time is thereby saved and whose work is placed far better than his own endeavours could place it.

AUTHORITIES.—
W. A. Copinger—*The Law of Copyright.*
Sir T. E. Scrutton—*The Law of Copyright.*
W. Briggs—*The Law of International Copyright.*
G. S. Robertson—*The Law of Copyright.*
R. R. Bowker—*Copyright: its History and its Law.*

CHAPTER XVI

GOODWILL AND RESTRAINT OF TRADE

Introductory—Goodwill—Restraint of Trade—Form of Sale of Business with Goodwill

INTRODUCTORY

Two most important subjects in connection with the conduct and disposal of a business may be considered conveniently together; in fact one proposition is generally incomplete without the other. The sale of goodwill must in most cases be protected by a condition restraining the vendor from competition. Neither of these is a subject which depends upon the statute law, the law having been built up by decisions in the Courts, and it so happens that the law upon both has been placed on a firm foundation by recent decisions in the highest Court. It will be convenient, however, to treat first of all of Goodwill, some commercial considerations of which have been already noticed in Part I, Chapter I.

GOODWILL

Goodwill is not capable of any exact definition. It was defined by Lord Eldon in one of the earliest cases—*Cruttwell v. Lye* (1810)—as "nothing more than the probability that the old customers will resort to the old place". But this definition must be enlarged in accordance with the growth of modern commercial requirements. As goodwill has become something more specific, easily ascertainable, and readily saleable, the term has received a much more liberal judicial interpretation in later cases.

Goodwill is now a recognized asset, and as such is entitled to be protected from any unfair attempt on the part of a vendor, late partner, or servant to appropriate it after sale or damage it on the termination of partnership or service. It is a well-recognized element on the sale of a business, and though it has often, on the conversion of a business into a public company, or on an ordinary sale, been extravagantly priced—its sometimes unknown quantity making its price as elastic as the particular market—so often it is truly more valuable than the stock-in-trade. It is therefore obvious to the non-legal mind that a vendor must not be allowed to depreciate the thing he has sold by soliciting the trade of his old customers; and so the law has been decided. Beyond this, however, the purchase of the goodwill will not protect the buyer from competition with the vendor unless he specially covenants against such competition. In this way the questions of goodwill and restraint of trade are inter-related. The leading case, *Trego v. Hunt*, in 1895, clearly laid down that, where the goodwill of a business is sold without further provision, the vendor may set up a rival business, but—and this was the great point of the decision, overruling a previous conflict of decisions—he is not entitled to canvass the customers of the old firm. Such a vendor of a business may be restrained therefore by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor or not to deal with the purchaser. The principle is applicable to the case where a person has been taken into partner-

ship on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner or shall form an asset of the business to be disposed of in a certain way, or where a clerk or servant has obtained information in the course of his employment. We may therefore consider the subject under two heads:

(*a*) The rights of the party who is the owner of the goodwill, either as the person who built it up, as the partner to whom it results, or as purchaser.

(*b*) The rights and liabilities of a person who has sold the goodwill of an existing business.

The Owner of the Goodwill

It is now well established in law as a rule, which will be well understood by the commercial community as one of justice and sound common sense, that a person having sold his business may not set up another business and represent it as a continuation of the identical business he has sold. If the rule were otherwise, goodwill would be an article which would practically have no commercial value, for without the protection of the law a person might set up a competing business the day after and carry off the whole of the business connection which he had purported to sell. Not only the goodwill, but many businesses themselves, would be unsaleable.

Speaking generally, therefore, the owner of the goodwill has the sole right to the use of the old trade or firm name. He has the benefit also of any contracts entered into by the old firm for the protection of that business—as, for example, contracts restraining others, late partners or employees, from competition with it. He has also the sole right to any trade marks, the property of the business (but see Chapter XIV of this Part as to Trade Marks).

In the case which firmly established the rule as to goodwill—*Trego v. Hunt* (1895)—one Trego had carried on business as a varnish and japan manufacturer for many years, when he took Hunt into partnership, on terms that the goodwill should remain the property of Trego. The partnership was continued until Trego's death. A new partnership was then made between Hunt and the widow of Trego and another person, providing, as in the former case, that the goodwill should remain the sole property of the Tregos. Towards the time of the expiration of this partnership the Tregos found that Hunt was employing a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. Hunt admitted that his object in having the list made was to acquire information so that he might, when the partnership concluded, canvass these persons and endeavour to obtain their custom for himself. On behalf of the Tregos, therefore, an action was brought to restrain Hunt from making any copy of, or extract from, the partnership books for any purpose other than for the partnership business. The House of Lords finally laid down the law, overruling the Court of Appeal and Mr. Justice Stirling, both of which Courts were bound by previous decisions. The most recent of these decisions had been *Pearson v. Pearson* (1884), holding that, even though the goodwill belonged to one of the partners, it was lawful for the other, on the termination of the partnership, to canvass the customers of the firm. This decision in the Court of Appeal had itself upset a series of decisions culminating in *Labouchere v. Dawson* (1871). In that case Lord Romilly, Master of the Rolls, had decided that persons were not at liberty to depreciate the thing which they had sold, and that a vendor was not entitled personally or by letter, or by his agent or traveller, to go to anyone who was a customer of the firm and to solicit him not to continue business with the old firm but to transfer it to him. Following this case Sir George Jessel in *Crutwell v. Cooper* (1880), and in another case, *Leggott v. Barrett* (1880), had gone still further and expressed the strong opinion that the man who sold the goodwill of his business must not only refrain from soliciting old customers, but must not deal with them. As regards, however, this latter proposition it is not now, if it ever was, good law. The Court of Appeal had no difficulty in deciding in the last-named case that, if a person applied for goods, a vendor need not go so far as to refuse to supply him. There was no implied obligation either legal or moral to shut his door against a customer who came to him of his own free will. In another case—*Walker v. Mottram* (1881)—a brewer's business had been sold, not by the owner himself but by his trustees in bankruptcy, and there the Courts refused an injunction to restrain the bankrupt from soliciting the customers of his business on the ground that the doctrine did not apply to such a sale, whether the bankrupt had joined in the sale or not.

In delivering the principal judgment in *Trego v. Hunt*, Lord Herschell examined all these decisions and the older authorities, commencing with the decision of Lord Eldon in *Cruttwell v. Lye* (1810). There the business of a bankrupt carrier between Bristol and London had been sold by his assigns. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath, and London, and directly solicited the public, stating that he had been reinstated in his business. Lord Eldon thought he could not be restrained, as he had not

himself been a party to the sale, and Lord Herschell agreed that the law was now settled that the sale of a goodwill of a business, even when the vendor is himself a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. Since Lord Eldon's time, however, as we have seen, a wider protection has been necessary, as business has extended and developed.

Goodwill Defined

Lord Hatherley, when he was Vice-Chancellor Page-Wood, said: "Goodwill, I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the *premises* in which the business was previously carried on, or the *name* of the old firm, or with *any other matter* carrying with it the benefit of the business"—*Churton v. Douglas* (1859). Lord Herschell said: "It is the connection thus formed together with the circumstances, whether of habit or otherwise, which tend to make it permanent that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can; the latter has a custom ready made." Lord Herschell did not think that the obligations imposed upon the vendor of a business would necessarily be the same under all circumstances. As Lord Chancellor Westbury had said in *Hall v. Barrows* (1863): "Goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business". Those who formerly constituted the firm when a dissolution takes place are not to be restrained from carrying on what trade they please, unless they have entered into agreements.

Restrictions on the Vendor

It must be taken to be settled law in the absence of such agreement that a person may set up a competing business next door so long as he does not represent himself to be continuing the old business. As Lord Herschell said: "If a person who has previously been a partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may, of their own accord, transfer their custom to him, but this incidental advantage is unavoidable and does not result from any act of his. . . . But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the person to whom it has been sold, and to restore it to himself." This is what he will be restrained from doing whether he be a vendor or retiring partner not entitled to a share of goodwill.

As Vice-Chancellor Plumer said in an older case—*Harrison v. Gardner* (1817): "A person not a lawyer would not imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers". Yet the authorities show that the sale of a goodwill does not import restraint. Lord Macnaghten, in the leading case, quoted this with approval, adding: "I do not think that 'a person not a lawyer', to use the Vice-Chancellor's phrase, would suppose that a man might sell the goodwill of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities . . . undoubtedly show that a man who has sold the goodwill of his business may do much to regain his former position, and yet keep on the windy side of the law." A person who has sold his business may therefore trade and in the very same line of business "if he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. . . . He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain without consideration that which he has parted with for value. He must not make his approaches from the vantage-ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not, I think, to be excused by any maxim of public policy." Thus Lord Macnaghten

defined the rights and limitations of the vendor of goodwill in *Trego v. Hunt.*

This rule is easily maintainable and intelligible to the wide business world on the grounds where Lord Macnaghten placed it, namely, that it is not right to profess and to purport to sell that which you do not mean the purchaser to have. It is not an honest thing to take the price and then to recapture the subject of sale; to decoy away or call it back before the purchaser has had time to attach it to himself and make it his very own.

Valuation of Goodwill

Since the decision in *Trego v. Hunt* numerous cases with regard to goodwill have come before the Courts. An indication was afforded in *in re David and Matthews* (1899) as to how goodwill should be valued. There, in a partnership of coal merchants and commission agents, it was provided that in case of the death of one of the partners a general account of the position should be made, including all effects and securities of whatsoever nature they possessed, and the value of such effects and securities should be estimated as at the date of such decease. A valuer and arbitrator was agreed upon, but he was in doubt if he could take into consideration anything for goodwill. The Court decided that the arbitrator ought to consider the question of goodwill, if any, and to set such value upon it as he might consider to have been attached to the business at the death of the partner; and that the value, if any, of the goodwill ought to be appraised on the footing that if it were sold the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit any person who was a customer of the old firm prior to the death of the partner, or the right to carry on business under the old name.

In *Gillingham v. Beddow* (1900), one of two partners bought out the other under terms provided in the Articles, which also provided that the other might set up a similar business in the neighbourhood. It was held that this was merely declaratory of the law, and did not confer any right to solicit old customers.

Rights and Liabilities of Vendor of Goodwill

It follows from what has been said that in the ordinary way a person who has sold the goodwill of a business, unless otherwise restrained, may engage in a competing business. A retiring partner may do the same; a confidential manager or a traveller is equally free, in the absence of binding agreement restraining him. It becomes therefore a matter of the first consideration on the part of anyone purchasing to enquire how far it is necessary and feasible to limit this legal right of competition with those most likely to be signally effective competitors. Without some limitation the purchaser of the goodwill may find himself possessed of a "barren joy".

Consideration of the rights of parties with the benefit of restrictive covenants or subject to restraint is postponed until later.

Rights to Goodwill and Firm Name

The rights of a person, apart from purchase, to a firm name, depend upon whether it is a genuine or an assumed name. No person can be restrained from trading in his own name, and generally he is at liberty to trade under any name he chooses to adopt; but a person may be restrained from trading under a name not his own if the assumed name is, in fact, a representation that he is carrying on the business of someone else. For example, Charles Robinson is entitled to trade under that name as a wholesale grocer and provision merchant, although a well-known firm is established in that line under the name of Charles Robinson, which it is clear would be subject to some injury by reason of a competitor of their own name. but Charles Robinson might be restrained from carrying on business as Robinson, Smith, & Co., if that were the name of an already established firm in the same line of business, and there were evidence of confusion between the firms. This is due to the general rule of law that while no one may be prevented from carrying on business in his own name, even if there be an ulterior object, yet the adoption of a name with the intention to appropriate the rights of someone else is a commercial fraud, which the Courts will not allow. An injunction was granted in 1910 at the instance of a company, the Ouvah Ceylon Estates, Ltd., restraining another company, the Uva Ceylon Rubber Estates, Ltd., from carrying on business under that name, as it was calculated to deceive and was likely to cause confusion, and possibly divert some of the plaintiff's business. (As to company names, see Chapter IV of this Part.)

The right to the use of the firm name came up in *Burchell v. Wilde* (1900). Upon the dissolution, in that case of a solicitors' partnership, without any sale or assignment of the goodwill and without any provision as to the use of the firm name, it was held that each of the partners was entitled to carry on business under that name, provided that he did not do anything to expose

his former partners to any risk of liability. Whether there is any such risk must be decided according to the circumstances of each case. In this case the use of the firm name, under the suggestion of the Court, was made the subject of compromise and variation.

It has been decided that the person who becomes entitled to the "assets" of a business, if he is not restricted, is entitled to the goodwill and the use of the firm name—*Jennings v. Jennings* (1898). Where the goodwill of and interest in a business which had been carried on as "Madame Elise & Co." was sold with the right to use that name, Elise being the name of the vendor's wife, the purchaser was held not entitled to trade under the name of "Madame Elise" simply, as that might lead to the belief that the vendor was still trading—*Chatteris v. Isaacson* (1887).

The benefit of a partner's covenant not to carry on a similar business passes by assignment of the goodwill, but unless the right to use the firm name was expressly assigned it cannot, as we have seen, be used so as to expose the late partner to liability. Ordinarily, however, no appreciable risk will be run if the words "& Co." are added, where the late partner has not used the firm name as his own except in connection with the firm. But the purchaser of a freehold shop, with the vendor's name carved in stone thereon, cannot be compelled to erase that name which he does not use. If he uses the name without right, however, he can be restrained—*Townshend v. Jarman* (1900).

Private Name

Subject to what has been said on the use of a name in the way of trade, a person is entitled to assume what sort of name he likes. It is very doubtful if a legal change can be made in a Christian name, but a new surname may be assumed at any time provided there is no fraudulent intent.

A change of name is often assumed in consequence of directions under a will by which a person benefits. In that case the terms of the will may stipulate the nature in which the change is to be effected. This may be done by royal licence, in which case stamp duties are imposed, or by executing a deed poll, or simply by adopting another name and using it, and thus giving it a public reputation. It is usual, however, to execute a deed poll and notify the change of name by advertisement in terms like the following:—

I, Robert William Cadogan, heretofore called and known by the name of Robert William Smith, of ....., in the County of ....., Gentleman, hereby give public notice that on the ..... day of ..... I formally and absolutely renounced, relinquished, and abandoned the use of my said surname of Smith and then ASSUMED and ADOPTED and determined thenceforth on all occasions whatsoever to USE and subscribe the NAME of CADOGAN instead of the said name of Smith. And I give further notice that by a Deed Poll, dated the ..... day of ....., I formally and absolutely renounced and abandoned the said surname of Smith, and declared that I had assumed and adopted, and intended thenceforth upon all occasions whatever to use and subscribe the name of Cadogan instead of Smith, and so as to be at all times thereafter called, known, and described by the name of Cadogan exclusively.

Dated the ..... day of .....

(Signed) ROBERT WILLIAM CADOGAN,
late Robert William Smith.

Goodwill as Property

Goodwill, as the subject of ownership, may be treated like any other class of property. It may be sold, it may devolve on intestacy, or be made the subject of bequest by its owner. Where Goodwill is the property of a partnership, and not of an individual member, it is part of the partnership assets which must be realized for the benefit of all partners, the partners sharing in the proportions in which they are entitled to the assets. It follows, therefore, from the rules with regard to Goodwill which we have been discussing, that on such a sale the name and connection of the firm will pass to the purchaser, but that each partner is entitled so long as he does not use the name of the firm or represent himself as carrying on the same business to engage in competition. (See Chapter III of this Part.)

The sale of Goodwill in some cases is necessarily accompanied by other undertakings, such as introduction and recommendation, apart from the question of future conduct. A doctor invariably undertakes to introduce his successor, perhaps by personal visits; other professional men may agree to recommend not only for private practice but for public appointments.

Loss of Goodwill

Goodwill may often be of great value to a person, but he may be in danger of being deprived of it without any legal remedy. It may be snatched from him by the establishment of another house next door or in the same street. This is part of

the effect of competition, and can, of course, have nothing to do with the law of goodwill.

Goodwill may become attached to premises, and the premises may pass out of the hands of the owner of the goodwill. To prevent such a disaster a business man has often had to pay a considerable sum to the owner, his lessor, who has himself done nothing to contribute to the goodwill, but who would not be prevented, on the expiration of the lease, from letting the premises to a competitor of the former lessee. The case is one of the hardships which often aggravate and distress a business man. At the commencement of his career he has not been able to look far enough; he has not felt justified in anticipating his success, or his ordinary business cares have not left him time or means to become the freeholder when the freehold might have been acquired on reasonable terms. Obviously the only course for such a tenant to take is to protect his goodwill by seeking a renewal of his lease when the old one has still some years to run. If he cannot do that on fair terms, he may vacate the premises and transfer his business to new premises, while he still has control of the old. He may then gradually sever the goodwill from the premises, perhaps letting the old premises to someone not in a competing line, and thus securing a complete transfer of goodwill to premises over which he has obtained adequate control. (As to tenants of business premises in Ireland, see Chapter IX of this Part.)

Professional men, especially doctors and dentists, are liable to suffer in the same way, there being always a probability that a certain amount of the practice will cling to the premises, and the newcomer may be prepared, notwithstanding professional etiquette, to pay some enhanced rent in consideration of it.

These eventualities should be considered in the first instance when taking a house or premises. It is sometimes possible by a clause in the lease to safeguard this loss. Where an establishment or house is taken upon an estate it may even be possible to go further and stipulate that a competitor shall not be allowed to set up business on the same estate.

Effect on Goodwill of Mortgage of Premises

The attachment of goodwill to premises may sometimes produce hardship to the owner who is also the occupier. He may have been compelled to mortgage the premises, and the goodwill may then pass to the mortgagee; but not where there is a lease in existence and possession is never taken by the mortgagee—*In re Bennett* (1899).

Where a company includes in a charge all its "property" the charge will cover the goodwill and business of the company, and in a debenture-holder's action the Court will appoint a manager —*In re Leas Hotel Company* (1902).

RESTRAINT OF TRADE

Restraint Generally

The doctrine of restraint of trade, which may be regarded as the counterpart to that of goodwill, depends upon judicial decision which has fluctuated from time to time, but which has now become settled by the House of Lords decision in the *Maxim-Nordenfelt* case. It was at one time considered that any restraint upon the freedom of any person to engage in any occupation was against the public interest, and therefore ought not to be upheld by the Courts. The change in public opinion, the growth of commercial undertakings, the extent to which business relations pervade the world, has not only induced the Courts without any legislative sanction to recognize the doctrine of restraint, but has more and more extended that doctrine to cover wider restraints both as to time and place.

The original principle that a man ought not to be restrained from exercising any lawful business at his own discretion has been whittled down like many other doctrines depending upon abstract justice and supposed regard for the public good by the mere reasoning which shows that it may often be for the good of a man that he should be allowed to restrain his future actions, and that it is also for the public good that such restraints under proper conditions should have binding force. The preservation of commercial relations and morality demands that reasonable conditions of this character should be upheld, and many classes of property would be unsaleable at anything like their commercial value unless accompanied by such conditions. It must be understood at once that covenants in general restraint of trade are still void, it being considered against public policy that such restraint should be encouraged; and in the opinion of some this general doctrine has been too much disregarded in recent decisions.

Any contract in restraint of trade to hold good must be made for a consideration, even if under

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[illegible] NATIVES CARRYING [illegible]

seal; and the restraint must be a reasonable one. In medieval times the rule was a simple one: all restraints of trade, whether general or personal, were thought to be contrary to public policy and therefore void. It was this inflexible rule which had to be overcome, and the earlier decisions had their origin in apprenticeship, where it was seen that the master was clearly entitled to some protection from the competition of one whom he had trained and let into his trade secrets.

What Restraint is Reasonable?

One of the earliest cases having a practical bearing upon to-day was that of *Mitchel v. Reynolds* (1711), where a baker retiring from business agreed with the purchaser not to carry on the business of a baker in the parish of St. Andrews, Holborn, for five years, under a penalty. He broke the agreement, and was held liable to pay the penalty. There was little difficulty in this case in deciding that there was both consideration and a reasonable measure of restraint.

It was Chief Justice Parker, afterwards Lord Macclesfield, who had most to do with shaping the law on restraint of trade. He said in *Mitchel v. Reynolds* that "in all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded and the Court is to judge of those circumstances accordingly, and if upon them it appears to be a just and honest contract it ought to be maintained".

Chief Justice Tindal in a dentist's case—*Horner v. Graves* (1831)—said a reasonable contract was one which would give "a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public".

It was long supposed that the restraint must be limited in point of time and place, and it is well established that in all cases the restraint must be reasonable. Cases were decided which affected all kinds of trades and professions, in which the circumstances of each were considered by the Court, and where a consideration, the adequacy of which was not material, was shown, and the restraint itself was reasonable, the contract was generally upheld.

In some cases, however, the restriction in time and place was held to be wider than the circumstances required, and part of the contract was held good and part void. This is still so. Some examples of such contracts held to be reasonable are as follows: A solicitor was restrained from practice, after employment as managing clerk, for twenty-one years within 21 miles; and in another case from practising in London, Middlesex, and Essex, or anywhere from acting for clients of the firm with whom he had been articled. A surgeon, for so long as the plaintiff should carry on business in a certain parish, was restrained from practice in that parish or within 10 miles. The licensee of a patent was restrained from the manufacture or sale of frames not fitted with the invention during the continuance of the licence. A traveller in lace was restrained from at any time travelling on any part of the same ground over which he had been employed to travel.

In the case of the manufacture or sale of a patent leather cloth the restraint extended to an unlimited time, but the limitation of place was cut down to Great Britain or the United Kingdom, Europe being considered to be an unreasonably wide territory, and the restraint was then held to be good. Similarly an earlier case had decided that the covenant of a dentist not to engage in practice in London or any part of England or Scotland, was good so far as London was concerned, but was void as concerned other parts of England or Scotland.

A traveller in the champagne trade was restrained from travelling for others for two years anywhere, and for ten years from dealing on his own account. An infant, who had agreed not to engage in competition with a milk carrier within 5 miles for two years after his employment ceased, was bound by it, as it was held to have been made for his benefit. Where there was a contract with the lessees of patent machines not to use other machines not of the lessor's manufacture in conjunction with or as auxiliary to the leased machines, the contract was held to be good, giving a right to an injunction and nominal damages. But where a retiring partner had covenanted not to trade, act, or deal in any way so as either directly or indirectly to affect his old firm, the restraint was held to be too vague and therefore void. Where a tailor was restrained for a certain time from engaging in *any* business, the condition was held to be void.

A clerk and bookkeeper had agreed not to accept another situation as clerk or agent, nor to establish himself within a radius of 15 miles from the London Royal Exchange without the written permission of his employers for a period of three years after leaving the firm. Such permission was not to be withheld if it could be proved to the satisfaction of the employers that the proposed clerkship or agency was not with or for a firm trading in the same class of goods, or if it could be proved that after establishing himself the clerk would deal in goods other than those of the employers for a period of at least three years. It was held that

the clause showed that the restraint was intended to apply to all kinds of business whatever. It was therefore wider than was necessary for protection and was void—*Perks v. Sualfeld* (1892).

So also restraints on a fishmonger and poulterer engaging at any time in any business within 3 miles without consent; on a manager for cider merchants engaging for five years in any part of the world; on a tailor making any business arrangement in competition; on a builder for fourteen years within 30 miles; on a flour dealer for all time in the United Kingdom; on a hop merchant's traveller engaging as servant, agent, or principal for five years anywhere; were held unreasonable and therefore void conditions.

Where a dairyman contracted not to engage in business for an indefinite time during the continuance of service with his employer and after, and there was no definition of place, it was held that it was limited by the context, and applied only to the actual locality of the business. A distance of 150 miles from Wolverhampton for three years from dismissal was held to be a reasonable condition restraining a man from engaging in the enamelled hollow-ware trade, but not from engaging in "any business whatever". Where a newspaper reporter having joined a company as junior reporter subject to a month's notice covenanted not to accept employment with any newspaper in Sheffield or within 20 miles, the agreement was held to be void as against public policy. It so happened that in this case the reporter was a minor when he entered into the contract, and it was held to be not for his benefit, and therefore it could not bind him—*Leng v. Andrews* (1909). But, in any case, it is exceedingly doubtful if such a restriction would be enforced.

The covenant not to engage in business will cover the case where a professional man agrees to act as manager for another within a restricted area at a fixed salary.

A recent case which shows that a restraint must not be more than is necessary and reasonable to suit the case is one where the plaintiff restrained the defendant from carrying on any business which his employer carried on or might carry on. The defendant was held to be rightly restrained from carrying on the business of a baker and confectioner, in which his employer was then engaged, but not from engaging in the business of miller, straw or corn merchant, in which he was not then engaged but might engage.

A covenant not to engage in business as a provision merchant is not broken by the manufacture and sale of margarine in the prohibited area.

A covenant in restraint of trade will generally be construed in favour of the party restrained.

The Maxim-Nordenfelt Case

The leading case which came before the House of Lords in 1894 (*Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company, Ltd.*) is worth some examination. There the patentee and manufacturer of guns and ammunition for the purposes of war covenanted with a company to which his patents and business had been transferred, that he would not for twenty-five years engage, except on behalf of the company, either directly or indirectly, in the business of a manufacturer of guns or ammunition. The covenant in this case was unrestricted as to place, and the defendant sought to show, therefore, that it was unreasonable. As he afterwards entered into agreements with other manufacturers of guns and ammunition, the company brought an action against him to enforce the covenant by injunction. It was held that the covenant, though unrestricted as to place, was not, having regard to the nature of the business and the limited number of the customers, who must be obviously the governments of this country or other countries, wider than was necessary for the protection of the company, nor injurious to the public interests of the country. It was this case which produced a restatement of principles in the House of Lords and a consolidation of the law on points about which there had been some doubt, the doctrine being applied to the growing needs of the commercial community. As Lord Watson said: "The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts". Lord Ashbourne said: "It is necessary to bear in mind the vast advances that have, since the reign of Queen Elizabeth, taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas in or narrowed by the municipal laws of any country. It is not surprising to note" (but it is always worth the observation of the business man) "that our laws have been also expanded and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live." It therefore happened that a covenant in general restraint of trade in this case, which under the old conditions would have been held to be void

as against public policy, because unlimited in place, was held to be reasonable having regard to the particular circumstances of the case. Lord Herschell said it could not be doubted that to secure the requisite protection the same territorial limitations could not now be insisted upon which in former days would have been thought only reasonable. A covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. Regarding in that case the nature of the business, and the limited number of customers, he could not consider the covenant as exceeding what was necessary for the protection of the covenantees.

The Law as now Settled

Lord Lindley, in a later case, said the law as now settled could not be more accurately expressed than it was by Lord Macnaghten when he said (in the *Maxim-Nordenfelt* case): "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions. restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." This body of exceptions has been gradually built up, and is, as we have seen, still of an expansive character adaptable to changing conditions.

Agreements in Restraint

Restraint of trade or limitation upon competition is an important consideration for anyone buying a business, engaging an assistant, or accepting an articled clerk or apprentice. A reasonable agreement as to time and place should be entered into. A purchaser of a business should enquire if there are such agreements in force, and he will get the benefit of them if there are, or their absence may largely affect the question of his purchase. When money is paid for goodwill and connection, it is of the utmost importance that proper steps should be taken to protect the subject of purchase; and danger may come from the activities of the vendor, his friends and relations, or late employees. All these possibilities should be duly considered. The form the restraint should take must depend upon the circumstances of the case.

The parties who can enforce a contract in restraint of trade include the representatives or the assignees of those to whom the contract was originally made, and the benefit of a covenant in restraint of trade passes with the assignment of the goodwill.

The question whether the restraint is reasonable is for the Court to decide; but naturally the decision of the Court is guided by the trend of modern decisions.

It must be remembered that the condition imposing restraint is one of the conditions of the agreement, primarily in the interests of the person protected. Should that person, however, commit a breach of the agreement, the agreement will be at an end, and so will be the restraint on the other person.

Covenants in Restraint

From what has been said it will be seen that the form of the covenant must have regard to the facts of the particular case, and be reasonably drafted in view of those facts. The actual form will be gathered from the specimens which follow, taken from some of the cases which have come before the Courts.

The covenant in the *Maxim-Nordenfelt* case was in these words: "The said ..... shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of the manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that at the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said ..... shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same."

In *Townshend v. Jarman* (1900) the covenant was, in a corn and seed merchant's business: "Whether he shall have withdrawn from the partnership by notice as aforesaid, or the same shall have been determined by effluxion of time, or by death, or in any other manner, shall not during the period of ..... years from the commencement of the partnership (unless he shall purchase the share of the defendant under Article .....) carry on the business of a corn, seed, and manure merchant or nurseryman within a distance of ..... miles from ....."

In *Underwood v. Barker* (1899), the covenant, in a hay and straw business, of a wholesale and retail character, with permanent places of business in the United Kingdom and France, was held good at any rate so far as the United Kingdom was concerned. The agreement was as follows: "The said A is to do everything in his power to increase and improve the business of the said B, and will obey all their lawful commands, either by themselves or by their manager; and he further particularly agrees that he will not, for the space of twelve months next after his leaving or being dismissed, carry on the business of a hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchants in the United Kingdom of Great Britain and Ireland, or in France, &c. &c. And he further agrees that, for the space of five years after his leaving, he will not, either on his own account or as agent for others, be in any way engaged in the carrying on of a hay or straw or like business in the Republic of France; and will, in the event of his breaking this agreement by carrying on, or in any other way engaging himself in, the trade of a hay and straw merchant, pay to the said B £ as and for liquidated damages, and not by way of penalty."

In *Dubowski v. Goldstein* (1896) the agreement was in the following terms, which the Court held must be read as referring to business carried on in the particular locality and to customers who were customers while the employee was in the service of the employer: "That the employee shall not nor will during the continuance of such service or at any time thereafter serve or cause to be served for his own benefit or for the benefit of any other firm or persons or any company, either directly or indirectly, or solicit or in any way interfere with, or cause to be solicited or interfered with, any of the customers who shall at any time be served by or then belonging to the employer, his successors or assigns in the said business".

FORM OF SALE OF BUSINESS WITH GOODWILL

THIS AGREEMENT made the .... day ..... between A of ..... hereinafter called the Vendor, and B of ..... hereinafter called the Purchaser,

WITNESSETH that the Vendor hereby agrees to sell to the Purchaser

ALL THAT the goodwill of and in the trade or business of a wholesale clothier and manufacturer now carried on by him the said Vendor at 910 Cheapside in the City of London and at .. . . and at . ...

AND ALSO all the stock-in-trade . ... now belonging to and used in the said business at any of the premises before-mentioned on the terms hereinafter-mentioned:

AND the Vendor also agrees that he will if required without remuneration assist the Purchaser for the space of .. . .. months for the purpose of introducing him to the customers and connection and into the management of the said business:

AND ALSO that he will procure a grant of (or will grant) a lease of the premises now occupied by him (or will enter into an assignment of the lease now held by him) for a period of not less than .... years on the same terms he now holds the premises (or at an annual rent of .....).

THE Purchaser agrees to pay the sum of (£5000) for the said business and goodwill and also to pay for the stock-in-trade, tenant's fixtures and effects according to a valuation to be made by .... and ...., or, in the event of their disagreement, at a price to be fixed by an umpire appointed by them; the said £5000 to be paid in four equal instalments at intervals of three months; the first instalment of £1250 shall be paid on the signing of this agreement, and the other three instalments of £1250 each on the .... and the . ..... and the ..... respectively. The amount of the said valuation or price fixed by the umpire shall be paid within one month of the signing of this agreement.

AND IT IS HEREBY MUTUALLY AGREED between the said parties that the said Purchaser having duly paid the said amount of £1250 being the first instalment due on the purchase of the business and goodwill, and the amount awarded by the arbitrators or the umpire as the value of the stock-in-trade, &c., shall on . ... be let into possession of the business. Before that time all outgoings shall be paid by the Vendor and thereafter by the Purchaser. All trade book debts due at that date to the Vendor shall be received by him or by the Purchaser on his behalf and paid over to him as and when received, and all debts due from the firm at that date shall be paid by the Vendor.

THE trade account books shall remain at the office at

910 Cheapside, and be open to inspection by the Vendor or his agent appointed in writing at all reasonable times for [six months] from the signing of this agreement but after that time they shall become the exclusive property of the Purchaser.

IF from any cause whatever any instalment of the purchase money (after the first instalment thereof) shall not be paid on the day fixed by this agreement, the Purchaser shall pay interest thereon at the rate of [10] per cent per annum from the day such instalment became due.

AND the Vendor undertakes in consideration of this agreement that he will not for the space of [five] years from the signing thereof engage, either directly or indirectly, whether as principal, servant or agent, in any business connected with that of a wholesale and retail clothier in London or within fifty miles of the Royal Exchange, and if he should commit any breach of this undertaking that he will pay to the Purchaser the sum of £5000 by way of liquidated damages and not by way of penalty.

In Witness whereof, &c. &c.

AUTHORITY.—[Reference may be made to *Matthews and Adler*, "Covenants in Restraint of Trade".]

CHAPTER XVII

LIBEL AND SLANDER

Introductory—Publication—Slander—Slander of Title—Defences to Actions for Libel and Slander—Miscellaneous Aspects—Criminal Defamation—Scots Law of Libel and Slander.

INTRODUCTORY

The law of libel and slander is that part of the law which protects the character and reputation of individuals from defamation. The personal reputation may be connected with trade or business. The subject is of general interest to the public and business man, but it is of special interest to certain trades connected with printing, publishing, news-vending and other forms of publicity, who have ever to be on the lookout to avoid the chance of actions of this character against them as "publishers".

Libel is by writing, and is the more serious defamation, being regarded as both a wrong to the individual and a crime to the state.

Slander is defamation by spoken words, is only actionable under certain conditions, and can only be criminal when of a blasphemous, seditious, or obscene character, or inciting to a crime or contempt of Court.

Libel has always been regarded as the more serious injury, owing to a written statement being more deliberate, more permanent, and capable of wider and more ready dissemination. "His reputation is his property, and, if possible, more valuable than any other property", as was remarked by one of the judges, may indeed be said in these days in respect of many a professional or business man, or proprietor of an established business or special production depending upon his personal credit and reputation.

A libel or slander is a statement concerning any person which holds him up to "hatred, scorn, ridicule, or contempt", or has the effect of causing him to be regarded with evil opinion or suspicion, or to injure him in his office, profession, or trade.

Where the statement is in writing it is unnecessary to prove that special damage has resulted from it—libel imputes damage and may be sued upon forthwith. Slander, except in certain cases, is not actionable unless it can be proved that special damage, that is, damage as a natural and probable result, has resulted to the person from the slander uttered about him.

It is possible that there may be slander by gestures or signs without actual speech, as there may be libel by a drawing or statuary or caricature.

To constitute libel or slander the statement must refer to the person; but an injurious statement affecting the quality of goods he sells, or the method of selling, is really defaming a person. To write of a butcher that he sold diseased meat would be clearly a libel upon him. To call a newspaper a "lying rag" would obviously be defaming its proprietors. The plaintiff in such an action must show that the alleged libel reflected upon him personally. If the only meaning that could reasonably be attached to a written statement was that it was a criticism upon the goods or manufacture of a trader, it could not be the subject of a libel action; and whether in any case the words are susceptible of this personally defamatory meaning is for the jury—*Linotype Company v. British Empire Typesetting Machine Company* (1899). An action might be brought "on the case" if special damage were shown, sometimes erroneously called trade libel (see p. 219), or there is ground for a libel action if the words, although directly disparaging goods, impute carelessness, misconduct, or want of skill in business to a trader. But it must be proved that a reasonable man would re-

gard them as such a personal imputation. The Court of Appeal held—in *Griffiths v. Benn* (1911)—that it was extravagant to argue that an attack upon the system of certain tramway patentees must be regarded as an imputation upon the owners of the patents who supply the parts and license the use of the system.

Mere general words do not constitute a libel; they must be proved to have had reference to a particular individual, although he may not be named. It must be shown that ordinary intelligent persons would have known who was intended.

It is hardly necessary to discuss what the expressions "hatred, scorn, ridicule, and contempt" import. Mere words of chaff or idle abuse are not actionable. But it is a poor and generally an ineffectual defence for anyone who has referred to another as a "rascal", a "man of straw", a "desperate adventurer", a "fraud", or in such terms, to say that the words were not intended to be abusive. It is clearly libellous to use ironical praise. It may therefore be a libel to call a solicitor "an honest lawyer".

Just what is a libel, giving a claim for damages, is often a fine point for a jury to determine. Many frivolous actions are brought and dismissed; but what may often seem to be a very slight or no reflection on a man may be shown by circumstances to have a very clearly intended injurious effect upon him.

The imputation of dishonesty or incompetence in business or profession, or in a public position of trust or emolument, is a more serious class of libel from which it will be easy to see heavy damages resulting. To accuse a poor-law guardian of peculation, a town clerk of incapacity, a trustee of dishonesty, a solicitor of disgraceful or unprofessional conduct, an editor of incompetence, a cloth merchant of selling shoddy, would be highly defamatory of each and attacking him in his most vulnerable point. To impute insolvency to a trader, liquidation to a bank, that a manufacturer sells goods under a well-known trade name he has no right to use, are other examples of libel on a man in connection with his trade.

The ordinary meaning of the words used will be that which will be applied. If it is alleged that they bore any special meaning to those who heard or read them, the "innuendo", as it is called, must be proved, and must be such as a reasonable man would have drawn. The jury must draw the conclusion as to whether the words were in fact used innocently or with special meaning.

A circular to the effect that a firm "would not receive in payment any cheques of the branches of the Capital and Counties Bank" was held not to be defamatory as it was used without any defamatory intention; in their natural meaning the words were not libellous: the inference suggested by the plaintiff was not that which reasonable people would draw; and the onus lay upon the bank to show that the circular had a libellous tendency—*Capital & Counties Bank v. Henty* (1882).

Where words are not reasonably capable of defamatory meaning it is the duty of the judge to stop the case; but if there is a question of two meanings the jury will decide which was intended from a consideration of the whole statement.

PUBLICATION

It is essential to an action for libel or slander that there should have been publication. Publication does not necessarily mean a distribution broadcast; it means that the statement has been communicated to some person or persons besides the person affected. A statement in a sealed letter directed to the person and opened by him could be no libel. A letter, however, dictated to a clerk, typewritten, and copied in the office, and then sent to the person to whom it is written, is clearly published; and very slight evidence of publication is sufficient. If a person addresses a letter to another, knowing that it will be opened and read by a clerk or partner, that is a publication.

Publication may be unintentional, accidental, or in jest, or made in belief of the truth, but except where it is privileged, that will not affect its actionable character. Obviously anything written on a postcard or telegraph form is published.

A person may be libelled by another who uses his name in a manner which he intends to be fictitious and in good faith if the plaintiff can show that the reference would be understood by his friends and acquaintances as aimed at him—*Jones v. Hulton* (1910).

A husband's statement to his wife is not a publication unless they are living apart.

There may be circumstances in the publication which excuse liability, for example, where in the ordinary course of trade and without carelessness a libel is disseminated by a newsagent. But if a newsvendor knows, or ought to know, that a newspaper or publication contains libellous matter, he would not escape liability—*Emmens v. Pottle* (1885). The same rule applies to the proprietors of a circulating library. If they continue to issue a book of which they have had notice of withdrawal on the ground of its containing a libel,

they will be responsible for publication—*Vizetelly v. Mudie* (1900).

Joint Publication

When two or more persons publish a libel on the same occasion each is liable, as there is no question of contribution or indemnity between joint wrongdoers. Judgment against one, however, is a bar to action against others.

When there is a publication on separate occasions the rule is different. Then there is no liability on the part of one for the act of the others, and the fact that one has been sued is no bar to an action against the others. A libel often goes a round, and proceedings against one person are not sufficient to stop it. In the case of a publication in a newspaper it is usual to sue all the parties liable together: the writer of the article, the editor, the publisher, and the printer. They are all liable, and the jury may award damages against all. An agreement of indemnity between persons as to damages that might be awarded in respect of libel would not be enforced, though such agreements are of course common in editorial engagements.

Persons Liable, and who may Sue

A printer cannot recover his charges for printing libellous matter. If a printer finds in the course of printing a work that it contains defamatory matter he should refuse to go on, and can recover for the work he has already done which is not defamatory—*Clay v. Yates* (1856).

In an action for libel against a newspaper it may be given in evidence in mitigation that damages have been obtained from, or actions brought against, or compensation received or agreed for from, other defendants in respect of the same libel.

Both principal and agent are liable for publication, though, as we have seen, for an accidental dissemination of a libel in the ordinary course of his trade a person may escape liability if he can prove he did not know, and ought not to have known, that there was anything libellous.

A married woman is liable and can be sued in respect of her separate estate. A husband is liable for his wife's defamatory statements made during marriage, and for those made before marriage to the extent of the balance of any property he has acquired through her.

Corporations are liable for the libel or slander of their servants or agents when expressly authorized, or when in pursuance of general orders; or if in the discharge of their ordinary duty and for the benefit of their employers statements are made by servants or agents.

Alien friends, infants, lunatics, and bankrupts can recover damages for libel or slander; and in the case of a bankrupt damages so recovered do not belong to his trustee for distribution amongst his creditors. (See Chapter XI of this Part.)

When a libel is really upon the members of a corporation they can sue in their own names. A corporation or company can sue for a libel affecting its business or property, or for slander of trade. It is doubtful if there can be any ground for libel merely affecting the reputation of a corporation apart from its business. An article commenting on the insanitary condition of the cottages of pitmen, let by a colliery company to their workmen, was actionable at the suit of the company —*South Hetton Coal Company v. North Eastern News Association* (1894).

SLANDER

Words which if written would be actionable are not necessarily so if spoken. In seeking to make spoken words actionable an intending plaintiff must be prepared to prove that he has suffered special damage from them, in all cases except four. A man may be called a cheat, a swindler, or a blackguard without sustaining damage, therefore there is no ground of action unless damage is proved. If he can show that in consequence of such expressions he lost a special or even general trade or custom, or some appreciable advantage, an action will lie.

The exceptions to the ordinary rule where an action can be brought without proving such special damage, are:—

1. Where a criminal offence is imputed. By criminal offence is meant one for which a person may be punished not merely by a fine. It is not, therefore, sufficient cause of action to accuse a man of being drunk on licensed premises, but it is sufficient to charge a crime generally and not any specifically criminal act. To say a man "ought to be in jail" is a clear suggestion that he has committed a criminal offence; but to say that there were suspicious circumstances about the promotion of a company in reference to one of the promoters would not be actionable without proof of special damage, although such a statement is highly probable to admit of easy proof of special damage.

2. The imputation of an objectionable or contagious disease, making a person unfit for society.

3. An imputation against the chastity of a

woman or girl; but to discourage frivolous actions it is provided that unless the judge certifies that there were reasonable grounds, the plaintiff cannot recover more in costs than in damages.

4. An imputation upon a person in relation to his office, trade, or profession. It is essential that the words should have a close connection with an actual office, trade, or profession held or carried on at the time by the person, and that such words should tend to injure a person in that connection. To say of a mayor that he wanted the ability to express himself would not be actionable, as it would be if such words were applied to a professional advocate; but to accuse the former of anything which would make him unfit for, in the sense that he ought to be removed from, office would be actionable.

Public men must put up with a good deal of criticism, and must not fly to law to resent insinuations or even direct allegations of an unpleasant character upon their competence, motives, or sincerity. An allegation of misconduct is quite another thing.

It is more easy to see the ground of action when words are spoken of anyone holding an office of profit. Where there is a direct insinuation that a person is unfit for office, it might lead to his being deprived of it, and so directly to his loss of profit. To impute, by words spoken, incapacity or professional misconduct to a solicitor, doctor, architect, or other professional man is therefore at once actionable, as is a verbal charge against a tradesman of adulteration, a clerk of cheating, or a skilled workman of bungling, or a statement regarding any professional or commercial person which may lead to his losing his position in the world of business or his particular post or occupation.

SLANDER OF TITLE

A special form of slander which does not affect the character or reputation must be noticed here, and is of more commercial importance, although not strictly belonging to this branch of law at all. Slander of Title is a false statement, which may be either spoken or written or printed, injuriously affecting a person's title to property of any character, and causing him special damage. Technically such a suit is known as an "action on the case". It is to be noted that the statement must be false, malicious, and productive of special damage, but "malice" here only means want of good faith and proper motive.

Where a statement is made *bona fide* in protection of the rights of an individual, or one for whom he is professionally acting or representing, there is no cause of action.

The damage must be appreciable, and not merely such as might be expected to happen in a general way from disparaging observations. It is clear in a case where an intending purchaser is restrained from a contract when actually in negotiation by the fact of the words complained of, that an assessable damage has been sustained.

A similar cause of action arises when a false, malicious, and unjustifiable statement is made as to goods manufactured by a particular person, causing special damage. It is sufficient if the statement is made "without lawful occasion" and not *bona fide*. In pushing the sale of his own goods a man must not disparage others, though a tradesman may puff his own goods and use general terms of reference to others, such as "the best in the market", "defies all competition". Evidence of general loss of business resulting from a statement intended to produce, and in the ordinary course of things producing, a general loss of business is sufficient to support an action.

Where a rival firm wrote letters to a borough council reflecting upon a wood pavement the council were proposing to adopt, saying that roads paved with that wood were now in a rotten state, the jury awarded damages. The Court of Appeal upheld the decision on the ground that where there is proof of special damage traceable to wrongful imputation upon the goods of a trader, and that imputation is made maliciously, a cause of action arises—*Alcott v. Millar's Karri and Jarrah Forests, Ltd.* (1904).

To threaten legal proceedings in reference to another's business and goods, as to say that they are an infringement of patent, will be actionable when special damage is shown. (See also Chapter XIV of this Part.)

To say of a firm that it no longer carries on business, or to advertise as "the only manufacturer" of a certain article procurable elsewhere, is a slander on which it will be clearly open to another party to recover damages.

DEFENCES TO ACTIONS FOR LIBEL AND SLANDER

The principal defences available to anyone sued for libel or slander are:—

(1) To justify the statement;

(2) To plead that the statement was fair comment on a matter of public interest;

(3) To claim that the statement was uttered on a privileged occasion; and,

If the statement was in a newspaper or periodical, to tender an apology.

Justification

It may be a good but it is often a most dangerous defence to set up that the words spoken or written were true in substance and in fact. But if they are true, however serious, there can be no defamation, and therefore it does not matter if they were spoken maliciously. To plead that the words are true and not to be able to substantiate them will be sure to aggravate the damages.

The whole statement must be substantially proved to be true. The contents of a paragraph in a newspaper may be substantially true, but if the heading is unjustifiably sensational, damages may be given for the defamatory heading.

Not every particular need, however, be proved, if sufficient can be shown to justify the general imputation. The truth of a general charge may justify even inaccuracies as to details not affecting the main charge; but exaggeration, on the other hand, would destroy the defence.

It is not justifiable to pursue a man with the name of "felon" when he has served his term of confinement, and is then apparently living the life of a respectable citizen.

Fair Comment

If a statement can be shown to be a *fair* and *bona-fide* comment on a matter of public interest, the action will be dismissed. Otherwise there would be no liberty of speech and no criticism of public affairs to which so much good is due. It is for the judge to decide whether the matter is of public interest, and the jury will consider what latitude should be allowed under the circumstances.

To mix comment with reports of proceedings is always dangerous. In literary criticism the critic must confine himself to the work; he must not go outside and reflect on the private character of the author. Of course his general literary position is matter of fair comment, as the business position, the financial standing, of a man, or the public demonstration of a new invention, is matter of fair comment in connection with any particular proposal made to the public.

"A man who publishes a book challenges criticism," said Lord Chief Justice Cockburn, but malice must not creep into criticism. A comment actuated by malice cannot be deemed fair, and proof of malice may therefore put a criticism otherwise fair outside the limits of fair comment.

A criticism of a matter of public interest must not impute base and sordid motives. What are matters of public interest? Proceedings in connection with Government and Parliament and public life, the law, the Church, literature, art, and general matters in which the public are concerned and to which their attention is invited.

The comments must be fair and honest, and not consist of imputations of bad motives.

If a statement is justified by its truth, the plea of fair comment is unnecessary, for where a statement is true there can be no defamation.

It is for the jury to give the true meaning to the words complained of, and to say if they fit the plaintiff. A defendant is entitled to have the verdict of the jury on a plea of "fair comment" as to whether or not the words exceed the limits of fair comment. The question must be distinctly left to the jury whether the meaning attached to the words by the plaintiff is the meaning which they would carry to the ordinary reader. A personal attack may be part of fair comment if the facts in the particular case are truly stated and, reasonably inferred, warrant it—*Dakyl v. Labouchere* (1909).

Privilege

The defence of privilege means that although the statements may be defamatory yet they are made in the interests of public policy, and no liability can therefore attach.

Privilege is of two kinds:—

Absolute privilege, which covers any statement, however untrue or malicious; and

Qualified privilege (of more frequent and practical importance), which only avails as a defence if the statement was a *bona-fide* one, made under reasonable circumstances. If actual malice is proved the statement is not protected.

A judge will rule against a plaintiff when the occasion is privileged, but the jury are to say whether, in a case not absolutely privileged, a party has acted with improper motives in making the statement.

Absolute Privilege

Cases of absolute privilege are—

1. Statements made in Parliament; or in the course of judicial proceedings; or in proceedings of State or the public services.

The privilege of Members of Parliament only exists when they speak in Parliament; for the same statement outside they are liable to be sued. Absolute privilege attaches to all parliamentary proceedings, petitions, and evidence before Committees in Parliament, &c.

In judicial proceedings nothing said by a judge, nor by jury, counsel, parties, or witnesses, if made in connection with the matter at issue, can be the subject of damages for defamation.

The Report of an Official Receiver to the Court in the winding-up of a public company is absolutely privileged—*Bottomley v. Brougham* (1908).

Questions have arisen as to how far the privilege extends to bodies exercising a semi-judicial authority. The authority must be acting in a capacity judicial and not ministerial. Members of a county council exercising their licensing functions, are not a judicial body, and the utterances of any member are therefore only protected by qualified privilege—*Royal Aquarium v. Parkinson* (1892).

2. Reports and parliamentary papers published by order of either House of Parliament, as well as reports of Select Committees, are absolutely privileged. This is a statutory privilege due to the Act of 1840, passed after the decision in the notorious case of *Stockdale v. Hansard* (1837), where a printer had been sued for a publication issued by order of the House of Commons.

Civil or criminal proceedings will immediately be stayed by order of a judge on the production of a certificate that the report complained of was published by order of either House of Parliament.

Qualified Privilege

Qualified privilege extends to a number of cases, *provided that the statement was not made with an improper motive.* Such a statement may be made in exercise of a duty to others who have an interest in the subject matter, or where there is a common interest or the communication is made in self-defence, or as a fair and accurate report of parliamentary, judicial, or other public proceedings.

1. A newspaper report of proceedings in a Court of Justice, published at the time, if it is substantially true and a fair and accurate though not literal report, which is not prohibited by the Court nor blasphemous or indecent, is privileged.

It should be remembered that the report is privileged, but no comments are allowed to be made while the proceedings are taking place, on the ground that they might prejudice the trial. All comments, whether proper or improper, are reserved until the hearing is over. The public is very familar with cases where editors and others have been proceeded against for contempt of Court for commenting upon proceedings during the trial. This is, however, no part of the law of libel.

2. Honest and accurate extracts from statutory registers, parliamentary papers or other "Blue-books", and accurate and *bona-fide* reports of proceedings of public and professional bodies exercising a discretion or jurisdiction, such as the General Medical Council, are privileged—*Allbutt v. General Medical Council* (1889).

3. A fair and accurate report of parliamentary proceedings is privileged if not published maliciously. This was established in the well-known case of *Wason v. Walter* (1868), where the proprietor of *The Times* newspaper was sued for publishing a report of a debate in the House of Lords in which speeches reflected on the plaintiff.

Comments in a newspaper are privileged so long as a jury think them honest and made in a fair spirit, and justified by the circumstances disclosed in an accurate report of the debate.

4. Fair and accurate reports in a newspaper of the proceedings at public meetings are privileged if the matters reported are of public concern and benefit and not blasphemous or indecent. In this and the next two cases, however, the protection is not available if the newspaper proprietor has been requested to insert a reasonable letter or statement by way of contradiction or explanation of such report and has refused or neglected to do so. Nor does the privilege apply to meetings where neither the public nor any newspaper reporter is present.

In any action against a newspaper for libel the defendant may plead that the statement was inserted without actual malice and without gross neglect, and that before the commencement of the action and at the earliest opportunity he inserted an apology in the newspaper; or, in the case of a periodical published at intervals exceeding one week, that he offered to publish such apology in any newspaper or publication selected by the plaintiff. Such a plea must be accompanied by payment into Court of some amount in satisfaction, and no other defence is then available.

5. Reports of the proceedings at meetings of town councils and other local authorities and committees, if complying with the same requirements; and

6. Publications at the request of any Govern-

ment office or department, officer of state, commissioner of police, chief constable, or any notice or report issued for the information of the public, are privileged, provided that such a statement is not published maliciously, the matter is not blasphemous or indecent, and it is for the public benefit.

7. Certain statements are privileged if made *bona fide* and without malice when they are made by a person to another person who has an interest in the subject-matter on which the communication is made or where there is a duty in connection with it.

The statement may be made in answer to an enquiry or may be volunteered. Such a class of privilege embraces all such communications as those made in connection with the character of servants; the respectability or financial position of a tradesman; giving information as to dishonesty or crime in other persons; and where two persons are connected in some business relationship and a communication is made on the matters of common business interest, as directors to shareholders, or from members of the same company or club one to another, and so on.

This connection is an important one for business men, as it includes those statements honestly made in connection with the character of employees, officials, and subordinates, and statements made during a confidential relationship existing in business.

If an enquiry is made by a person who has a legitimate interest in the matter, and the reply is relevant and to the point, it is privileged. For example, a reply to a letter by a secretary of a company to the transferor of shares asking if the transfer is in order, if relevant, is privileged. If no enquiry has been made the case is different. As Lord Blackburn said in *Capital and Counties Bank v. Henty* (1882): "If the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it, so long as he is acting in compliance with that duty or exercising that right; and the burthen of proof is on those who allege that he is not so acting".

In confidential relationships, such as exist between master and servant, husband and wife, father and son, principal and agent, solicitor and client, partners, trustees and creditors of an estate, and in other cases where a confidential relationship can be shown to exist, this qualified privilege exists; but a privileged occasion cannot be made to spring up by merely marking a letter "private", or making a communication confidentially".

A circular letter sent by a secretary to a company to certain customers, if not maliciously reflecting upon an individual, is a privileged communication; as where it was notified that a new branch had been opened, and that "the agency of ..... at ..... had been closed by the directors". Such a privilege can only be rebutted by proof of actual malice; and malice on the part of the secretary alone might not make the company liable—*Nevill v. Fine Arts and General Insurance Company* (1877).

Where cards were sent out by a firm to their customers saying "H. B." (their late traveller) "is no longer in our employ. Please give him no orders or pay him any money on our account", the words were held to be not capable of a defamatory meaning—*Beswick v. Smith* (1908).

A statement of this character must, however, be reasonable and made without any malice, and must not be given a wider publicity than the occasion demands.

Such statements should always be made with caution. The mere publication of information in the belief that it is true and of interest is not justifiable. Where a statement is made in discharge of what has been called a "legal, social, or moral duty", and not maliciously, it is always privileged.

There is a distinction in cases where the giving of information is a matter of business profit. No privilege attaches to information supplied by a trade-protection society to its customers which is injurious to the character of an individual. Such a communication is only privileged if made in the general interests of society and from a sense of duty. It is not so if made from motives of self-interest by those who, for the convenience of a class, trade for profit in the characters of other persons and who offer for sale information which, however cautiously and discreetly sought, may have been improperly obtained—*Macintosh v. Dun* (1908).

Proprietors of mercantile agencies are volunteers supplying information as a matter of business, and their motive is self-interest. The risks they run illustrate the truth of what Vice-Chancellor Knight Bruce once said: "Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much".

While in Britain employers cannot be compelled to give characters, if they do so *bona fide*, they cannot be made to suffer for what they say; and a printed monthly circular to servants of a company informing them of the discharge of a servant

is privileged—*Hunt v. Great Northern Railway Company* (1891).

8. Statements made to those in authority as to a public wrong, as communications with regard to suspected crimes or misconduct, are privileged if made in good faith and without malice; such are petitions to a public department or official, information to the police, complaints to a parent or employer.

9. A person may protect himself, when attacked, by a reasonable statement as to the character of his opponent. A director who is charged in a public meeting with fraud may retaliate upon his opponent, and show his character to be such that his statements are worthless. Newspaper controversy may justify statements in self-defence that otherwise would not be permissible.

MISCELLANEOUS ASPECTS

Mitigation of Damages

A person who has been so unfortunate as to get into a libel or slander action, and is not anxious to justify, should take steps to mitigate damages, if not to settle the question at once. It is open to a defendant at the trial, if he has given due notice beforehand, to give in evidence that before the commencement of the action, or as soon after as possible, if he had no previous opportunity, he has offered to make an apology. This would be the wisest course in most of the trivial actions for defamation, however reluctant a defendant may be to "climb down" in the face of what he considers an unjustifiable or ridiculous charge.

Injunction

It should be noticed that the continued publication of the same or a similar libel or slander may be restrained by injunction at the trial, or in certain exceptional cases before it.

Limitation of Actions

An action for libel or slander, with proof of special damage, must be brought within six years; or for slander which is actionable without proof of special damage, within two years. But if a plaintiff was an infant or lunatic, or "beyond the seas" at the time the statement complained of was made, he may bring his action within the six or two years of the removal of the disability.

Where the person defamed dies, no right of action survives to his representatives, as it is a strictly personal right of action.

CRIMINAL DEFAMATION

It has often been judicially remarked in the course of the trial of civil actions for libel that libel is a crime, and, if of an outrageous character, the remedy should be a criminal one. It generally happens, however, that if a defendant is worth powder and shot an action for damages is preferred. The fact that there is the double remedy may lead to abuse. On the other hand, although technically whatever is civil libel is also a crime, a jury would be reluctant to find a verdict, or a judge to record a sentence, against a defendant for what might reasonably have been met by a civil claim for small damages to secure public acknowledgment.

But a libel of a seditious, blasphemous, or obscene character should be punished by sentence, and here comes in the particular application of that often-quoted and often-misunderstood saying: "The greater the truth the greater the libel"; for the truth of such a libel is no defence unless it can be shown that its publication was also in the public interest.

A criminal libel may be proceeded upon when a deceased person or a body of individuals are libelled, because it might lead to a breach of the peace, and publication of such a libel to persons themselves libelled is sufficient.

It is a good defence to show that the words complained of are true and published for the public benefit. The defences of privilege, fair comment, and publication without authority and knowledge, and not in consequence of gross negligence, are also available.

The jury must find a general verdict of guilty or not guilty upon the whole matter—a right of the accused which was firmly established by Fox's Libel Act of 1792.

The publication of blasphemous, seditious, or obscene matter is a common-law misdemeanour. Prosecution is very unusual, and although theoretically "blasphemy" is a crime, it is only when it is of an outrageous character that proceedings are instituted. A man is free to teach what he likes as to religious matters, or as to his unbelief,

but in considering whether he has exceeded permissible limits the place where he speaks, and the class of people to whom he speaks, will be taken into consideration. Argument in honest belief is not blasphemous, but going out of the way to make a scurrilous attack on doctrines held by the majority of people, in a public place where passers-by may be offended and young persons influenced, makes the speaker liable to proceedings.

To proceed against a newspaper for criminal libel there must first be an order by a judge.

A false statement of fact in relation to the personal character or conduct of a parliamentary candidate is an illegal practice subjecting to penalties under the Act of 1895.

SCOTS LAW OF LIBEL AND SLANDER

While the general rules of law in Scotland with regard to libel and slander do not differ materially from those of England, on three special points the laws of the two countries show a wide divergence. In English law verbal defamation is called slander, while written defamation is known as libel; and in certain cases, as has been pointed out, language uttered as libel is actionable when it is not necessarily so when uttered as slander. Scots law does not, however, recognize this distinction, though, as a rule, a higher measure of damages will be awarded to one who has been slandered in writing than to one who has been made the subject of mere verbal defamation. In Scots law language is either defamatory or it is not: if it be defamatory it is known as slander, whether it be inscribed or merely spoken. Whether it be spoken or inscribed makes no difference in the consideration of whether or not it is defamatory. There is therefore in Scots law no distinction between libel and slander, though colloquially written slander is not infrequently referred to as libel, and the word libellous is commonly enough used to denote slanderous or defamatory imputations when expressed in writing. The second main point of difference between the laws of the two countries consists in this, that whereas in England defamatory expressions, to found a ground of damages against the person who uses them, must be communicated or published to a third person, Scots law grants *solatium* to a slandered person for the assumed injury thereby inflicted to his feelings. In Scotland, consequently, publication or communication of an alleged slander, whether in writing or merely verbal, to the person defamed, is sufficient to ground an action against the defamer, even though no possible pecuniary loss may have ensued from the utterance of the defamatory matter. In the third place the action is purely civil in Scotland, while, in England defamation may, in certain cases, result in criminal proceedings.

AUTHORITIES.—*W. B. Odgers*, "Digest of the Law of Slander and Libel"; *H. Fraser*, "Principles and Practice of the Law of Libel and Slander"

Scots.—Cooper, "On Defamation and Verbal Injury"; *Green's* "Encyclopædia of Scots Law".

THE WINE AND SPIRIT TRADE

By W. & A. GILBEY, Ltd.

In the year 1911 there were consumed in the United Kingdom 11,274,146 gallons of foreign and colonial wines, and 30,696,011 gallons of foreign, colonial, and British spirits, being in the proportion of about 2 imperial pints of wine and 5½ imperial pints of proof spirits for each head of the entire population of 45,216,665. In the same year there were also about 1232 million gallons of beer produced in the United Kingdom (= 27¼ gallons per head of the population), and the consumption of alcohol in the form of wine, spirits, and beer respectively is approximately as under, viz.:—

Contained in wine	...	3 millions of gallons of proof spirit.
„ „ spirits	.	30½ millions of gallons of proof spirit.
„ „ beer	..	100 millions of gallons of proof spirit.

WINE

Wine, properly so called, is the fermented juice of the fresh ripe grape. The grapes having been squeezed in a wine press, and the juice collected in a suitable vessel, the natural fermentation sets in almost immediately, without the aid of yeast (which is indispensable in the brewing of beer), and is continued for a somewhat indefinite period, say from four to twelve days, according to the nature and temperature of the wine that is being made.

The alcoholic strength of wine depends mainly upon the degree of sweetness of the grape at the time of its being pressed, which varies with locality and season; but in the case of the stronger wines, such as Port, Sherry, Madeira, &c., a proportion of wine spirit is added to the juice from time to time to arrest fermentation and to retain some of the sweetness of the grapes; while on the other hand light wines, such as Claret, Burgundy, Hock, &c., are fully fermented and the spirit they contain is solely the result of the conversion of the grape sugar into alcohol. The colour of wine is derived from the skin of the grape, the pigment or colouring matter being liberated therefrom by the action of fermentation.

The total quantity of wine produced in the world is estimated at 4000 millions of gallons, and as there are said to be only 1600 millions of human beings living there is enough wine made in an average year to give no less than 20 imperial pints of wine to every man, woman, and child on the face of the globe. Of this enormous quantity of grape juice, the great bulk is grown in Europe, France alone producing in a good year 1400 millions of gallons, Italy 1000 millions, Spain 400 millions, Portugal 100 millions, Austria 100 millions, Hungary 80 millions, Germany 60 millions, and all the other countries of Europe together 460 millions of gallons. The whole of Asia, Africa, America, and Australasia produce among them only the comparatively small quantity of 400 millions of gallons, and nearly half of that is grown in Algeria, where until about fifty years ago no vines had been planted.

Most of the wine produced in the world is consumed by the inhabitants of the region in which it is made, and relatively small proportions only are exported. Hence, wine-drinking peoples are found only in wine-growing countries. In France, for example, the 40 millions of inhabitants consume an average of more than 140 bottles of wine per head per annum, and the quantity exported

does not exceed 5 per cent of the total production. A considerable proportion of the total quantity of wine produced is distilled into brandy, and even this is chiefly consumed in the country itself, the quantity of brandy sent abroad being relatively small. The case of the French wine-growing colony of Algeria is exceptional with regard to consumption, for nearly the whole quantity grown is shipped to France for drinking there. This is due to the smallness of the number of white inhabitants of Algeria compared with the large area of land now under vine cultivation, and to the fact that the native population, being Mahommedans, do not drink wine. It is worthy of note that even in France in those districts where the grape vine does not flourish the common drink of the people is beer or cider, according to the local production of the soil, and there only comparatively small quantities of wine are drunk.

Consumption in Britain

The principal wines consumed in Britain are Claret, Sauterne, Burgundy, Chablis, and Champagne from France; Port from Portugal; Sherry and cheap red wines of the Port type from Spain; Hocks and Moselles from Germany; and red and white wines of the Burgundy type from Australia. There are also small quantities of various descriptions of wine shipped from other countries, such as Madeira from the island of that name, Marsala from Sicily, and red wines of the Claret type from Italy and Hungary. The wines shipped to Britain are generally speaking the choicest produce of the several wine countries, and are as a rule obtainable in the United Kingdom, notwithstanding the cost of freight, customs duties, &c., at prices as low as, or even lower than, are usually charged for the same qualities of wine in the countries of origin.

It would be quite a mistake to suppose that the wines known in Britain are only a fair sample of the wines commonly grown in Europe, for they are in fact much above the average quality of those produced. In France alone there are over 1500 different descriptions of vines cultivated, and in every wine-making area there are vineyards which have probably never been heard of outside their own *communes*, and which produce wines admirable for consumption in the district where grown, but which are altogether unsuited for transit either by land or water. Such wines, however, varying in style according to soil, climate, &c., constitute the ordinary beverage of all classes of the inhabitants, and represent more than nine-tenths of the whole quantity grown in the country. A great authority on wine has estimated that *vins de luxe*, as they are termed in France, do not amount to much more than 3 per cent of the total production, the remainder being classed as *vin ordinaire*. It is chiefly these *luxury wines* that find their way to Britain. Indeed, it would not pay the English wine merchant to import inferior wines, as the incidental charges, such as land carriage, sea freight, customs duty, cost of casks, bottles, bottling, &c., are the same for the cheaper descriptions as for those of the higher qualities.

Price Differences

The differences in the prices of wines are due to various causes. An abundant crop tends to lower the prices of the ordinary qualities of wine, while a failure of the vintage, like that of 1910, when not much more than half the average quantity was made, raises the values out of all proportion to the quality. The really choice vintages of any district or country do not vary in price so much as might be expected, for unlike beverage wines, which are generally consumed before they are more than one or two years old, the finer growths are not consumed until they are very old and well matured, so that there are always accumulated stocks of them lying in merchants' cellars sufficient to provide for several years ahead, and consequently a large or small vintage does not cause such serious alterations in the prices of these finer qualities.

Champagne

The preparation of Champagne and other sparkling wine is exceptionally interesting, differing as it does from the process of making "still" or non-sparkling wines. The characteristic sparkle is the result of a second fermentation, which takes place after the wine is in bottle, the first having occurred while in the vat or cask, in the ordinary way. During the second fermentation the wine is fully cleared of all sediment, and receives its final addition of the requisite amount of sweetness if it is intended for a sweet champagne; but when it is required to be drunk in its "natural" or "dry" state no sugar is added. Both white and black grapes are used in making Champagne, but the skins of the black grape are carefully removed before fermentation commences, otherwise instead of a straw colour the wine would acquire the appearance of Claret.

Claret

The highest type of natural red wine produced in any country is that which we know in England under the name of Claret. It is fully fermented,

and any addition of alcohol would be disadvantageous, as Claret in its highest perfection does not contain more than 19½ to 20 degrees of proof spirit, while the strength of the finest Burgundy will be about 22¾ degrees. The strengths of natural wines vary in different districts, and even to a limited extent in the same district. Claret is grown in that part of France called the Médoc, bordering on the wide estuary of the Gironde, where the utmost care and skill are devoted to the cultivation of the vine, and where soil and climate are alike favourable. Here are found the well-known growths of Châteaux Margaux, Lafite, Haut Brion, Larose, Leoville, and hundreds of others well known to the British public, including our own vineyards of Château Loudenne.

Port

Port wine is the highest type of *vin de liqueur* or preserved wine, and is highly esteemed in all British countries. It is a full red wine, the fermentation of which has been arrested at a certain stage by the addition of grape brandy, and it can be grown nowhere else to perfection than in the region of the River Douro, in Portugal. Shipped as a vintage wine under three years old, it is matured in bottle in Britain and retains for many years its colour and much of its body. If, however, it is stored in the cask it loses its colour far more rapidly than if kept in bottle, and becomes more and more "tawny", until in the case of extremely old wine the ruby colour has vanished altogether. Port is necessarily a "strong" wine, and in former times, when rule of thumb prevailed in wine-making, many bottles of good wine were found spoiled after two or three years of keeping, simply because of a deficiency of alcohol. The best Port wines contain about 36 degrees of proof spirit.

SPIRITS

The principal kinds of spirits consumed in the United Kingdom are Scotch whisky, Irish whisky, brandy, gin, rum, Hollands, and various liqueurs such as Chartreuse, Benedictine, Maraschino, cherry brandy, ginger brandy, peppermint, &c. Scotch whisky is of two principal descriptions, namely: malt whisky distilled in a "pot" still entirely from malted barley, and grain whisky made in the patent still from unmalted grain and a certain proportion of malt. Malt whisky has a full flavour and its finer qualities are developed only after it has been stored for some years. Most of the finer descriptions of malt whisky are produced in the Highlands of Scotland, especially in the Glenlivet district, where are situated, among others, the well-known distilleries of Glen Spey and Strathmill. Patent still or grain whisky has but little flavour, and is mainly used for blending with the full-flavoured malt whisky, being seldom sold alone.

There are about 160 distilleries in Scotland, 30 in Ireland, and 9 in England.

Irish whisky of the best quality is that distilled in the pot still from various proportions of unmalted barley, wheat, oats, and rye, together with some malt, according to the judgment of the distiller. The most esteemed Irish whiskies are those made in Dublin, where it is said that the water obtainable by some of the distilleries is particularly suitable; but however this may be, certain it is that great skill is shown in the manufacture, and that the spirit is extremely popular wherever Irishmen do congregate.

Brandy is distilled from grape juice in a pot still, and is made in all wine-growing countries; but that which has the highest reputation is known as Cognac brandy, and is produced only in the two Departments of the Charente from wine grown in these districts of France.

Gin is distilled from grain, and it undergoes a process of rectification or re-distillation, in order to produce an absolutely neutral spirit. Its characteristic flavour is derived solely from the berries of the juniper tree, crushed and distilled to extract the essential oils.

Rum is a spirit produced by distilling the molasses of the sugar cane, and it comes to this country from Jamaica, Demerara, &c.

Hollands, Geneva, or Schiedam, as it is variously named, is a Dutch spirit made from rye.

Liqueurs are usually compounded of sweetened spirits, flavoured with various aromatic substances.

The Wine and Spirit Merchant

It is the business of the wine and spirit merchant to obtain these several articles from the different countries, and distribute them in the form most convenient to the consumer.

At first sight it might appear quite a simple and easy thing to become a trader in wine, and in former times, when the old-fashioned wine merchant was the principal distributor, it was not unknown for gentlemen who had been overtaken by misfortune, like old Mr. Sedley in *Vanity Fair*, to set up as wine merchants, without any quali-

fications whatever except their family connections and their own appreciation of good wine. To-day, however, the successful wine merchant must be equipped with knowledge of many kinds, and must possess experience, ability, and industry. In tasting and buying wine he ought to be able to judge of its quality by the keenness of his senses of smell and taste, and of its commercial value by his knowledge of markets; he ought also to possess a familiar acquaintance with the principal wine-growing districts and their merchants, as well as a working knowledge of the customs, excise, and licensing regulations of our own country; when he has purchased a parcel of wine he ought to know how to take care of it in his cellars, so that it may not deteriorate by improper storage. In buying spirits, the merchant should know how to use the hydrometer in order to be able to ascertain the alcoholic strength of his purchases, and he should be able to work out calculations in degrees and percentages both of absolute alcohol according to the French system of Gay-Lussac and of proof spirit according to the British system of Sykes. Gay-Lussac has only 100 steps or degrees of strength between pure water (which is his zero) and absolute alcohol, while Sykes makes a mixture of *nearly* equal weights of water and alcohol which he calls proof strength, and, fixing his zero at 100 degrees *under proof*, he goes up and up to about 75 degrees *over proof*, so that metaphorically from the foot of the French spirit ladder to the top there are 100 rungs or distances, and in the English there are 175 rungs or distances, both ladders being of the same height. In other words, 1 degree of pure alcohol is equal to about $1\frac{3}{4}$ degrees of proof spirit.

For a list of some of the imposts levied by the British Government on the wine and spirit trade, see Chapter XXVIII of Part III of the present work.

APPENDIX

ADDENDUM TO CHAPTER IX, p. 71

The Small Landholders (Scotland) Act, 1911, to encourage the formation of small agricultural holdings, provides for the extension of the Crofters Acts to the whole of Scotland, and amends the law relating to the tenure of small holdings. The Act provides for the constitution of a Scottish Land Court for the settlement of questions between landlord and tenant in regard to such holdings, for the sanction of schemes, and for the ascertainment of a fair rent. For the encouragement of agriculture the Act authorizes the constitution of a Board of Agriculture for Scotland.

The House Letting and Rating (Scotland) Act, 1911, amends the law with regard to small dwelling-houses in Scotland, applying to houses of £10 or under if the population of the burgh or special district is less than 10,000, or £15 or under if it is 20,000 and less than 50,000, and £21 or under if it is 50,000 or upwards, except dwelling-houses occupied by their owners, or used as inns or hotels, or let with agricultural land or with business premises. No agreement for the let of such a small dwelling-house is binding if made more than two months prior to its commencement.

The 28th day of the month, or, if that is a Sunday, the 29th, is fixed as the lawful day on which all lettings shall terminate. Notice to terminate if the letting is for a period of more than three months must be forty days; for smaller tenancies, one-third of the period, or at least five days. A warrant for ejection of an occupier in arrears for not less than seven days, who fails to remove after forty-eight hours' notice, may be applied for; and a tenant is protected from being charged with an assessment prior to the commencement or after the expiration of his tenancy.

For small dwelling-houses the rates will be paid by the owners under allowance.

The Act was made operative from 15 May, 1912, but in any burgh with a population of less than 10,000, and in any special district, it must be adopted by the local authority.

ADDENDA TO CHAPTER X

The Shops Act, 1911

There are six Shops Acts (beginning in 1892), but it is proposed to consolidate the law on the subject. A "shop" includes any premises where any retail trade or business is carried on.

The Shops Act, 1911 (from 1 May, 1912), provides for early closing and shop assistants' meal-times. The Act provides for shop assistants one half-holiday in the week, except the week before a Bank holiday on which any assistant is not employed, 1.30 being the hour for leaving work. The early-closing day must be notified in the shop. Intervals for meals are to be arranged so that in general no person is employed more than six hours without an interval of at least twenty minutes. Three-quarters of an hour, or an hour if the meal is taken off the premises, must be allowed for dinner, and half an hour for tea.

Under the Shops Act, 1911, every shop must be

closed not later than one o'clock on one weekday in every week. The particular day may be fixed by the local authority, and there may be different days for different classes of shops, or different parts of the district, or different periods of the year, and the day may be changed to Saturday by the shopkeeper. Local enquiries by the Home Office may be held for promoting and facilitating early closing. During the hours of closing, ordinary retail trade must not be carried on elsewhere, except in the case of a barber, or an auction sale on private premises, or the sale of newspapers. There are exceptions to early closing in the case of shops for the sale of intoxicants, newspapers and periodicals, motor, cycle, and aircraft accessories to travellers, perishable foods and other articles, tobacco, medicines, railway bookstalls and exhibitions and shows, and also as regards Post-office business, the supply of necessaries to ships, and fairs and bazaars. Special provisions apply to shops where more than one business is carried on. The early-closing provisions may be suspended in holiday resorts for four months in the year. It is the duty of the local authority in a borough, or urban district if of 20,000 inhabitants, or otherwise the county council, to put the Act into force. The local authority may, on the request of at least half of the occupiers voting in any area, exempt the shops in that area from the early-closing provisions.

The local authority may also make an order for closing during the week at a certain time, not earlier than seven, saving cases of emergency and certain specified trades.

The Act applies to Scotland and to Ireland, subject to different local authorities, and in Ireland to special provisions as to shops retailing intoxicants.

Young persons (anyone under eighteen) must not be employed in or about the business of a shop for more than seventy-four hours (including meal-times) from midnight on one Saturday to midnight on the following Saturday; nor must such a young person be employed in a shop if on the same day, to the knowledge of the shopkeeper, the person has been employed under the Factory and Workshop Act for the hours permitted by the Act, or for a longer period than would with factory and shop work complete the hours allowed by the Act.

A child (one under fourteen) must not be employed between 9 p.m. and 6 a.m., nor any child under eleven in street trading. No factory half-timer must be employed in any other occupation, and generally no child must be employed in injurious or heavy work. Local authorities can make by-laws as to the employment of children and young persons, and street trading. Notice of such regulations must be given by the employer.

The Coal Mines Act, 1911

The Coal Mines Act, 1911, consolidates and amends the law relating to coal mines and mines of stratified ironstone, shale, and fireclay. After 1 January, 1913, there must be one manager to each mine, and he must not manage any other mine if the number of persons employed in the two exceeds 1000, or if all the shafts or adits of the two mines are not within two miles.

There must be daily supervision of the mine by a manager or under-manager, and owners or agents must not take part in the technical management, unless qualified. The inspector for the division may exempt small mines from these provisions. Managers must be at least twenty-five years of age and hold a first-class certificate, and an under-manager must hold a first- or second-class certificate. Certificates are granted by a Board for Mining Examinations, constituted by the Home Office, consisting of representatives of owners or agents, managers, workmen, inspectors, and other persons of special knowledge. After 1 January, 1913, firemen, examiners, and deputies must hold a second-class certificate and be at least twenty-five years old.

Workmen employed in the mine may authorize an inspection on their own account.

The Act contains safety provisions as to ventilation, use of safety lamps, requirements as to shafts and outlets, shafts and winding, travelling roads and haulage, support of roofs and sides, signalling, machinery, use of electricity, explosives, prevention of coal dust, inspections, and withdrawal of workmen. The provisions with regard to health include washing and drying accommodation at the request of the workmen, if the cost does not exceed 3*d.* per week per workman, the workmen and employer sharing the cost. The provisions as to accidents contain the requirements with regard to notice, reports and investigation, rescue work, and ambulances.

No boy under the age of fourteen and no girl or woman of any age is to be employed in any mine below ground. No boy or girl under the age of thirteen is now to be employed in connection with any mine unless previously employed. No boy or girl above thirteen and no woman is to be employed for more than fifty-four hours in any week, nor ten hours in any day, nor between nine at night and five on the following morning, nor on Sunday, nor after two o'clock on Saturday, nor continuously for more than five hours, and certain stipulated intervals are to be recognized. No boy,

girl, or woman must be employed in moving railway wagons, or in lifting, carrying, or moving heavy things. A register of boys, girls, and women is to be kept.

A Reference Committee consisting of the Lord Chief Justice of England, the Lord President of the Court of Session, and another person specially qualified, is constituted to appoint referees for the settlement of disputes.

With certain verbal alterations the Act applies to Scotland, and generally to Ireland.

The Coal Mines (Minimum Wage) Act, 1912

The Coal Mines (Minimum Wage) Act, 1912, was hurriedly passed in March of that year, owing to the miners' strike, which was threatening to paralyse the industries of the country. The Act is in force for three years.

The Act provides that it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay wages at not less than a minimum rate settled under the Act, unless it is certified that the workman is a person excluded under the district rules from the operation of this provision, or he has forfeited the right to wages at the minimum rate. District rules are made under powers conferred upon the joint district boards. They lay down the conditions which shall apply locally as to exclusion from the minimum rate of aged and infirm workmen, conditions as to regularity and efficiency of work, forfeiture, &c. The minimum rates of wages and district rules are settled separately for each of the districts scheduled in the Act, the joint district board being the body recognized by the Board of Trade. The general district minimum rates and rules are made applicable throughout the whole of the district to all coal mines and workmen employed underground in those mines. The Act did not prejudice any agreements or customs in operation at the time for the payment of higher rates.

Any minimum rates or district rules remain in force until varied, but they may be varied by the joint district board either by agreement between employers' and workmen's representatives, or, after one year, on application with three months' notice by either side.

The Act also provided that the Board of Trade should have power to intervene if a joint district board had not been set up within two weeks, or if within three weeks after its recognition such a board had not settled the first minimum rates and district rules.